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No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

LOMAR WHOLESALE GROCERY, INC.
Petitioner

v.

DIETER'S GOURMET FOODS, INC.,
GOURMET FOODS, INC.
AND ART STONE
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

QUESTIONS PRESENTED

1. The court of appeals erred in refusing to apply the per se rule to review a series of coerced refusals to deal which were implemented by a dominant specialty food distributor who induced several suppliers to refuse to deal with a competing distributor.

2. The court of appeals erred in concluding that a series of refusals to deal taken by suppliers of specialty food products at the request of one distributor for the purpose of eliminating competition by a competing distributor did not constitute a group boycott.

3. The court of appeals erred in ruling that an agreement to fix prices was not demonstrated by proof that a specialty food distributor was terminated because a competing distributor complained bitterly to suppliers about the terminated distributor's active price competition.

LIST OF INTERESTED PARTIES

The following individuals and corporations were interested parties to the proceedings below: Lomar Wholesale Grocery, Inc., the petitioner in this appeal; Deiter's Gourmet Foods, Inc., Gourmet Foods, Inc., and Art Stone, respondents in this appeal. These parties remain interested in this action, although subsequent to the filing of the lawsuit, Dieter's Gourmet ceased doing business and the district court permitted counsel for Dieter's Gourmet to withdraw from the case because of the unavailavility of funds.

Petitioner, Lomar Wholesale Grocery, Inc., has no affiliation or relationship, whether as a parent corporation or subsidiary corporation, with any other firm or organization.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Lomar Wholesale Grocery, Inc. (Lomar) respectfully requests that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered on July 13, 1987, which affirmed a decision of the United States District Court for the Southern District of Iowa dismissing Lomar's antitrust claims.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, reproduced as Appendix A, is reported at 824 F.2d 582. The opinion of the United States District Court for the Southern District of Iowa is reproduced as Appendix B and is reported at 627 F.Supp 105. The order of the Court of Appeals denying Lomar's petition for rehearing and rehearing en banc is reproduced as Appendix C.

JURISDICTION

The judgment of the court of appeals was entered July 13, 1987. A timely petition for rehearing or rehearing en banc was denied on August 13, 1987. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

STATEMENT OF THE CASE

This appeal stems from a series of anticompetitive acts taken by respondents Gourmet Foods, Inc. and Art Stone[1] to interfere with Lomar's access to necessary specialty foods. Lomar's case was built on evidence that Gourmet persuaded suppliers of important specialty food products to either refuse to deal with Lomar or to terminate Lomar as a distributor. R. I, pp. 20-30.[2] Lomar's complaint, then, alleged a pattern of exclusionary behavior by Gourmet aimed at destroying or impairing Lomar's access to trade relations with three important suppliers: Dieter's Gourmet (DG), a California producer of dietetic products, Chicago Dietetics (Chicago), an Illinois producer of dietetic products, and Celestial Seasonings (Celestial), a Colorado producer of distinctive teas. This pattern of exclusionary behavior extended for a lengthy period of time—from 1975 to 1981—and was taken for the purpose of protecting Gourmet from active price and nonprice competition by Lomar.

The following sections will describe the market for specialty food distribution in Iowa, the pattern of exclusionary conduct taken by Gourmet, and the proceedings below. The discussion of the relevant market, Gourmet's power in that market and the conduct engaged in by Gourmet is important not only to an understanding of the legal contentions in the Petition, but also to an understanding of the Court of Appeals' errors in affirming the grant of summary judgment in a case where there exists substantial and genuine issues of material fact.

A. The Market for Specialty Foods: This litigation involves specialty foods and the principal distributors of specialty foods in the Iowa area. Those distributors are Lomar, a closely-held Iowa corporation, and Gourmet, a Minnesota corporation. Specialty

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[1]Respondent Art Stone is the president of, and sole shareholder, in Gourmet. He was a defendent and appellee in the lower court proceedings, and textual references to Gourmet shall necessarily include Stone unless otherwise indicated.

[2]References to the four volumes of appendices in the Court of Appeals shall be "R. __, pp. __" and references to the Appendixes in this Petition shall be "App." followed by a reference to the particular appendix and page number.

foods include products such as ethnic foods, slow-moving products, seasonal products, and dietetic foods. Because of the unusual nature of these products, most grocery wholesalers do not carry all or most of these products, although they may typically carry some of the products. R. IV, pp. 388-9. Grocery wholesalers and specialty food distributors serve the same general customer base (i.e., retail grocery stores, chain supermarkets, etc), but they do not carry the same line of products. *Id.*

In the Iowa area[3], Lomar and Gourmet are the only specialty food distributors. *Id.* Lomar trades in the upper midwest states from its location in Des Moines, Iowa, and Gourmet sells thoughout the midwestern states and as far south as Texas. Gourmet is the largest specialty food distributor in the United States. R. IV, p. 426. In the Iowa market, however, specialty food distribution is roughly divided evenly between Lomar and Gourmet, although both firms face peripheral competition from grocery warehouses which sell a few specialty food items and face marginal competition geographically from specialty food distributors in adjacent territories (e.g., Wisconsin, Nebraska, etc.). R. IV, pp. 388-9.

Lomar's complaints about the persistent acts of exclusionary activity by Gourmet concerned Lomar's existent and potential trade relations with several important suppliers. These suppliers—DG, Chicago Dietetics, and Celestial—produce and sell products which are important for specialty food distributors who hope to compete for store and supermarket accounts. For example, DG produced dietetic products which were recommended and promoted by Weight Watchers franchisees throughout the United States, and this promotion greatly increased consumer demand for the products. Similarly, Chicago Dietetics produced the Featherweight brand of dietetic products, which gained tremendous consumer appeal.

By and large distributors of specialty food products were not

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[3]The relevant geographic market in this case includes all of the State of Iowa and some adjacent trade territories in contiguous states. This is the area in which Lomar and Gourmet actively competed.

accustomed to territorial or other restrictions imposed by suppliers and producers of specialty food products. More precisely, nonprice vertical restraints, such as exclusive dealing and territorial and customer restrictions, are not used in the specialty food industry, and the suppliers and producers of these products customarily use wide distribution methods to achieve maximum retail store penetration.

B. The Pattern of Exclusionary Conduct: Gourmet, in an effort to limit the competitive pressures—both price and nonprice—it felt from Lomar, engaged in a series of actions designed to exclude Lomar's access to the three suppliers. These actions, and accompanying relevant factual matters, will be described in the context of each set of relationships.

1. Dieter's Gourmet. In mid-1975, Lomar first approached DG to place a firm order for DG products. At that time Gourmet was a DG distributor, but because the DG products were actively promoted by Weight Watchers franchisees, Lomar sought direct access to DG products. DG refused to supply Lomar and Lomar acquired DG products from a distributor, M & JR Hakes (Hakes)of Laurens, Iowa, even though the cost of the products was higher than the prices charged on direct purchase from DG. From 1975 to 1979 Lomar purchased from Hakes and other distributors because Lomar was unable to deal directly with DG.

From 1975 to 1976 Hakes sold DG products to Lomar, but Hakes purchased DG products from Gourmet, and, upon learning of Hakes' sales to Lomar, Gourmet refused to sell DG products to Hakes. R. III, p. 444. Subsequently, Hakes attempted to deal directly with DG, but DG refused to deal with Hakes because Gourmet vetoed Hakes' attempt to deal directly. In the correspondence between DG and Gourmet, Gourmet's Art Stone stated that his reason for vetoing Hakes was that Hakes "was selling the product to other distributors, and that was really defeating our purpose, so we discontinued selling them." *Id.* At the same time that Gourmet terminated Hakes and then vetoed its application to deal direct with DG, Gourmet discovered that Lomar was selling

DG salad dressing in Des Moines at a low per case price and Gourmet expressed grave concern about Lomar's access to DG products. R. III, p. 448; R. I, p. 403. Following Hakes' termination, Lomar was able to obtain DG salad dressing from other midwestern distributors, but these relationships were unsatisfactory to a growning firm like Lomar because the supply of DG product was uncertain and Lomar was unable to get quantity discounts.

In 1979, Lomar again sought to obtain DG's salad dressing, which was endorsed and approved for use by Weight Watchers, but without success. A series of letters were exchanged between DG and Gourmet, which was still a distributor of DG products, concerning the appointment of Lomar as a distributor. The content and context of those letters, and the reasonable inferences flowing from the letters, presented several major fact issues in this litigation. In principal part, the discussions between Gourmet and DG presented issues of fact on whether Gourmet had an "exclusive distributorship", whether it had the power to veto the applications of other distributors like Lomar that were seeking access to DG products, and whether the market study proposed by Gourmet was merely a pretextual justification for DG's refusal to deal with Lomar. It was Lomar's contention that Gourmet was excesing its relative buying power to coerce DG's refusal to deal with Lomar and that the coercive activity was taken to prevent price competition by Lomar.

In the first instance, it was clear that DG had no intention of granting any firm an exclusive distributorship for DG products. Thus, although Gourmet has contended that it had such a distributorship, the sales manager and general manager of DG did not believe that DG had an exclusive arrangement with Gourmet.[4] Moreover, the terms of the agreement do not permit an inference that the parties intended to create an exclusive arrangement. The agreement provided for termination virtually at will, and none of

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[4]Murry Kurz, an attorney by training, was general manager of DG, and he testified that there was no intention on DG's part to create an exclusive distributorship with DG. According to Kurz's testimony, it was his intention to avoid an exclusive arrangement because of his belief that such an arrangement was illegal under the antitrust laws. R. I, pp. 360-3.

the written or oral terms provided for or otherwise contemplated exclusivity within any designated territory. Finally, the arrangement provided that DG was obligated to submit to Gourmet the name of any company which had requested to be added as a DG distributor. R. III, p. 439.

Second, the obligation that DG notify Gourmet of any firm's expression of interest in becoming a DG distributor is important because such a provision, which gives a distributor the power to approve its own competition, is peculiar. The evidence shows that DG, upon receipt of Lomar's request to sell DG products, communicated immediately with Gourmet and agreed with Gourmet that Lomar should not be added as a distributor at that time, but DG concurred with Gourmet's suggestion that a distribution analysis be conducted. R. III, p. 439.In fact, there is no evidence in the record that DG submission of inquiries over distribution rights to Gourmet was either common in the industry or serves some beneficial purpose. Rather it appears that Gourmet and DG assumed that a distributor could grant permission to its supplier to approve or disapprove adding another distributor whenever the supplier was contacted concerning the addition of another distributor. Moreover, the fact that Gourmet frequently instructed DG to refuse to supply a prospective distributor (Hakes, for example) or refuse to deal with a distributor (Lomar, for example) creates a pressing inference that Gourmet's relationship with DG was unusual, and that Gourmet had the right to veto applications from prospective distributors.

The evidence also demonstrates that the so-called "distribution analysis" was pretextual in purpose, designed to kill some time and give an appearance that DG and Gourmet were earnest in evaluating Lomar's request and the quality of Gourmet's service in the area. First, the idea to conduct the analysis did not originate with Levine or anyone at Dieter's Gourmet; it began with Art Stone of Gourmet. R. I, pp. 404-6. Second, the survey was neither designed nor conducted in a manner which would achieve the information which the participants ostensibly hoped to achieve—

i.e., how well was Gourmet servicing its customers.The survey cards had been sent out before Lomar asked to purchase DG products. R. I, p. 343. The few basic questions on the survey cards were not remotely related to price, service and availability characteristics of Gourmet's distribution activities. R. I, p. 450. There was no follow-up on the few cards which provided any meaningful information, although the DG employee in charge of the survey stated that she was supposeds to telephone customers that responded.

2. Chicago Dietetic Products. In 1975 and 1976 Lomar was selling Chicago products in parts of Iowa. Chicago and Lomar dealt on a non-exclusive basis, although Gourmet was able to service the major part of the state and Chicago asked Lomar to confine its sales to certain areas in Iowa. In the spring of 1976, however, Lomar began to actively compete with Gourmet's price on the very popular Featherweight brand of dietetic foods produced by Chicago. Lomar also made some sales outside the territory designated by Chicago. On February 26, 1976, Stone received a frantic note from a salesman claiming that Lomar had sold about 16 cases of Featherwight product to a store outside Des Moines and to "Please help!" R. III, pp. 441-2. On that day, Stone called Tony Rittendale of Chicago to complain, and the next day Stone received a memo from his secretary stating that Rittendale had called, "regarding your discussion last night" and "he has given instruction to Mr. Riley [Chicago's field representative] to cut Lomar off. Asks that you bear with him." R. III, p. 440. Frank Riley candidly admitted under oath that the termination was in response to the "chaos" that Art Stone was creating at Chicago concerning Chicago's sales to Lomar. R. I, pp. 364-67. There was substantial evidence that Lomar was engaging in active price competition with Gourmet in sales to supermarkets in Iowa and Minnesota and that Gourmet had grown bitter at Chicago for selling Featherweight to Lomar. There was also evidence that Lomar was developing new customers for Chicago products and was actively soliciting business. R. I, pp. 385-9.

3. Celestial Seasonings. Lomar also possessed a non-exclusive right to sell Celestial Seasonings products in Iowa. However, in July of 1981, Ken Vickerstaff of Celestial met with Lomar's Lou Hurwitz and a Celestial broker to discuss Lomar's distribution of Celestial products in Iowa. R. I, p. 368. Following a dispute between Hurwitz and Vickerstaff, the decision was made that Vickerstaff would let Hurwitz know in a couple of months if Lomar would continue as a Celestial distributor. Vickerstaff, however, left Des Moines and went to Minneapolis to call on Gourmet, and it was at that point that the decision was made to terminate Lomar. R. I, pp. 373-5. A former employee of Gourmet testified that shortly after Vickerstaff's visit with Stone and Gourmet, Gourmet's sales force was told that Lomar had been terminated by Celestial and that Gourmet would replace Lomar in stores formerly serviced by Lomar. R. I, pp. 376-9. Lomar was not notified of the decision to terminate for over two months.

The compelling inference here is that the decision to terminate Lomar was made by Vickerstaff and Art Stone in Minneapolis and not at a later time in Boulder by Celestial.

4. Factual Summary: Lomar's Antitrust Claims. Lomar brought this litigation because of Gourmet's instrumental role in causing DG to refuse to supply goods to Lomar and the termination of Lomar as a distributor of Chicago and Celestial products. Lomar attempted to pursue its case with the realization that there was little direct evidence of anticompetitive agreements between the suppliers and Gourmet, but that there were substantial inferences of collusive and anticompetitive activity by Gourmet and the suppliers. In the case of DG and Chicago[5] the refusals to deal were directly related to Lomar's active price competition in the

[5]The district court held that Lomar's antitrust claims concerning Gourmet's actions on Chicago products was barred by the statute of limitations. The Court of Appeals affirmed the district court, rejecting Lomar's claims that there were acts following the termination which demonstrated a continuing conspiracy. Lomar is not appealing from that decision. However, the evidence of Gourmet's actions with respect to Lomar's distributorship rights to Chicago products is admissible to demonstrate Gourmet's boycotting and price fixing motives in dealing with other suppliers. *See Hill v. Bache Halsey Stuart Shields, Inc.*, 790 F.2d 817 (10th Cir. 1986); *Spartan Grain & Mill Co. v. Ayers*, 517 F.2d 214 (5th Cir. 1975).

Iowa market. However, the refusals to deal by all suppliers were also related in part to Gourmet's buying power and acclamations that it was "the largest distributor of specialty and ethnic foods in the United States." R. IV, p. 426. Celestial's refusal to deal with Lomar seems to be related to Gourmet's efforts to turn Celestial away from Lomar, the dispute between Vickerstaff and Hurwitz, and Celestial's acquiescence in Gourmet's desire to get rid of Lomar's competition.

C. Proceedings Below: Lomar filed this antitrust action on August 30, 1979, alleging, *inter alia,* that Gourmet had violated section 1 of the Sherman Act, 15 U.S.C. §1, by engaging in a group boycott to exclude competition from Lomar and by causing Chicago and DG to terminate Lomar for price-related reasons.[6] Jurisdiction in the district court was based on 28 U.S.C. § 1337 and 15 U.S.C.§§ 15 and 26.

Following the filing of summary judgment motions by Gourmet, the district court dismissed all Lomar's antitrust claims. On the boycott claim the court found that there was no horizontal communication between the specialty food suppliers, but rather that all activity went through Gourmet. Significantly, the court found that "Lomar is contending, in effect, and a *jury could reasonably find that [Gourmet] and Art Stone had a goal of eliminating or weakening Lomar as a competitor* in the business of specialty food distribution *and that [Gourmet] and Art Stone agreed separately with each of the three manufacturers without direct contact between the manufacturers that the manufacturers would not deal with Lomar."* App. B-10. The court found as a matter of law that the concerted action taken by Gourmet and the three suppliers could not be characterized as a group boycott and that their actions should not be scrutinized under the per se rule. App. B-12. The court rigidly catagorized the types of restraints that may be

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[6]Lomar's complaint and amended complaints also alleged that Gourmet and the suppliers had engaged in a horizontal territorial allocation and that Gourmet had engaged in price discrimination. Neither the district court's determination nor the court of appeals' decision with respect to those issues are raised by this Petition.

analyzed under the per se rule and held that the restraint in this case did not fall into any recognized category. App. B-12. Moreover, the court characterized the restraints in this case as a "de facto exclusive distributorship" and held that they should be analyzed under the rule of reason because they are "likely to promote intrabrand competition." App. B-14.

Lomar appealed the rulings of the district court, and the jurisdiction of the Court of Appeals was premised on 28 U.S.C. §1291. The Court of Appeals affirmed, holding that this case was not governed by *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) because there was no horizontal agreement between the three suppliers and the *Klor's* decision requires "some collusion between competitors on the same market level." App. A-17. The Court of Appeals, in considering whether the restraints in this case should be analyzed under the per se rule, noted that there exists a division of authority on the appropriate form of antitrust analysis in cases involving horizontally motivated boycotts. App. A-17 to -20. However, the court concluded that there may be sufficient pro-competitive justifications for such boycotts to make administratively difficult the process of determining the proper refusal to deal from the improper ones. App. A-21 to-23.

The district court also rejected Lomar's claim that Gourmet had engaged in an illegal form of vertical price-fixing by coercing or otherwise inducing suppliers to terminate (or not initiate) relations with Lomar for price-related reasons. App. B-18.The district court, purporting to apply this Court's holding in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), stated that it "can find that [Gourmet] had the power to veto applications by other distributors to obtain a distributorship in its territory, can find that the market study was a pretext designed to camouflage the decision which had already been made by [Gourmet and DG] to refuse to deal with Lomar, can find that [Gourmet]did not have an 'exclusive distributorship' with [DG], and can find that [Gourmet] raised its prices after Lomar was unable to buy [DG] products," and still not find an actionable conspiracy. App. B-16. The Court of Appeals agreed,

holding that the *Monsanto* decision precludes a finding of conspiracy where the evidence shows that a distributor was terminated for price-related reasons important to a complaining distributor rather than as part of the supplier's resale price maintenance arrangement. App. A-13 to-14.

REASONS FOR GRANTING THE WRIT

There are several reasons that this Court should grant the petition. The first, and most obvious, reason is that the Court of Appeals' decision on Lomar's group boycott claim exacerbates a growing conflict among the appellate courts. Indeed, the Court of Appeals expressly noted the discordant positions of other appellate courts, App. A-17 *et seq.*, but then adopted a position which confounds not only the purposes of the Sherman Act but also this Court's interpretations of the fundamental policies underlying traditional antitrust analysis. The Eighth Circuit held that boycotts involving allegations that a powerful distributor coerced or induced suppliers of important products to terminate a competing distributor are not subject to the rule of per se illegality, but rather should be reviewed under the rule of reason. The court imagined that such boycotts, which it characterized as vertical, possessed sufficient possibilities of pro-competitive effects as to preclude a rule of presumptive illegality. There are, however, more compelling reasons to which apply a bright-line rule against dealer-coerced or inspired boycotts. A ruling from this Court would serve to clarify the existing conflict and create uniformity among the circuits on this issue.

Sound antitrust policy requires that clearly anticompetitive behavior be condemned in all its manifestations because the infrequent appearances of pro-competitive effects are not worth the judicial costs and difficulties attendant careful review of those effects on a case by case basis. Boycotts which are spearheaded by a competitor of the victim for the purpose of making competition more costly for the victim or to exclude the victim from the market

cannot warrant relaxed antitrust treatment because the terminating manufacturer or supplier occasionally receives useful market information from the complaining distributor. In most situations, dealer coercion which is intended to cause the supplier to cease trade with another dealer is imposed to avoid price and nonprice competition from the victim and not to respond to any information requests from the supplier.

The Court of Appeals decision, and its interpretation of this Court's opinion in the *Klor's, Inc.* case, turns the policy of *Klor's* literally on its head. The *Klor's* case was about the social and economic value of an economically powerful dealer inducing suppliers to refrain from dealing with a competing dealer. The case was not, as the Court of Appeals held, about horizontal conspiracies at some level of trade other than the dealer level. The appellate court's quest for some structural perspective on dealer-coerced boycotts led the court to confuse the type of conspiracy—vertical or horizontal—with the Sherman Act's policy forbidding conduct which restrains trade.

This appeal presents an issue of general significance to the proper administration of the rule against restraints of trade. This Court's recent opinions have tended to stress the application of analytic standards which permit judges to facially examine the nature and effect of challenged conduct and to strike down conduct which had little probability of fostering competition. The Court of Appeals' holding, if allowed to stand, requires courts to perform balancing acts under the rule of reason which will allow a great deal of clearly anticompetitive behavior to avoid remedy. The holding also requires much more elaborate proceedings to determine the reasonableness of conduct which was undertaken for clearly anticompetitive reasons. The Court of Appeals held that the courts have had sufficient experience with dealer-coerced boycotts, and their arguably pro-competitive effects, to justify application of the rule of reason. App. A-22 & n.5. The Court of Appeals was correct in concluding that the courts have had sufficient experience to apply an appropriate form of antitrust analysis, but that court erred in

holding that the rule of reason was the appropriate form of analysis. Under the facts of this case, and careful analysis of other courts that have addressed this issue, it is clear that there are no demonstrable pro-competitive attributes which are always, or usually, created by dealer-coerced boycotts, and the per se rule is the most efficient method of reviewing such conduct.

There also exists a conflict among the circuit courts of appeal on the issue of the quality and type of evidence which can create an inference that a competing distributor and supplier conspired to terminate another distributor for price-related reasons. Some courts have rejected claims that a dealer's complaint about a competitor's price-cutting or discounting can support a vertical price fixing count; other courts have held that a vertical price fixing claim can be established by proof that the supplier and dealers discussed the dealer's concerns about the price-cutting competitor and, in response to the discussion, the supplier terminated the price-cutting firm. The conflict among the lower courts is even sharper in circumstances where a particularly strong dealer is able to coerce supplier agreement to terminate a competing dealer. A definitive ruling from this Court would resolve this perplexing and persistent issue and resolve a substantial conflict among the circuit courts of appeal.

The Court of Appeals' ruling on Lomar's vertical price-fixing claim also presents an issue of general significance to private enforcement of the Sherman Act and the proscription against price fixing activity. There are no substantial and pro-competitive reasons for permitting a dealer to induce a supplier to terminate a competing dealer because of price competition by the terminated dealer. Rather, this Court has consistently rejected the claim that price-affecting conduct undertaking with the purpose, or having the effect, of artifically stabilizing or depressing prices is permissible, pro-competitive conduct. A clear ruling from this Court condemning such dealer-inspired or coerced conduct would affirm the fundamental policy of the Sherman Act against price-fixing.

I. CERTIORARI SHOULD BE GRANTED TO DETERMINE THE PROPER STANDARD FOR ANALYZING BOYCOTTS COERCED BY A POWERFUL DEALER AND AIMED AT A RIVAL DEALER

There are three reasons that the Court should grant certiorari in this case and reverse the finding of the Court of Appeals that Lomar's boycott claim is not unreasonable. First, the clear weight of persuasive authority requires the conclusion that the per se rule should apply to dealer-inspired or coerced boycotts. Second, the policy of the *Klor's, Inc.* case requires that the per se rule apply to these types of boycotts. Third, judicial experience with these restraints, and the advancement of sound antitrust policy, require facial invalidation of dealer boycotts, and the lower courts in this case erred in refusing to apply the per se rule and instead attempting to apply a standard of reasonableness.

A. Antitrust Policy and the Inter-Circuit Conflict. The Court of Appeals pointed out that the circuit courts of appeals have divided on the issue of the proper form of antitrust analysis—per se rule or the rule of reason—which should be applied to dealer coerced boycotts. However, the court did not carefully assess the rationale underlying the decisions of those courts. Those rationale, however, have important implications on antitrust policy and should have been adopted in this case.

Some of the courts which have held that the rule of reason is the appropriate analysis for dealer-coerced boycotts have merely attempted to characterize the structure of the parties relationship as vertical or horizontal and have concluded that if the relationship is vertical then the rule of reason is to be applied. *See, e.g., Key Financial Planning Corp. v. ITT Life Insur. Corp.*, 828 F.2d 635, 640-21 (10th Cir. 1987); *Fine v. Barry and Enright Productions*, 731 F.2d 1394, 1398 (9th Cir.), *cert. denied*, 469 U.S. 881 (1984). Other courts, again stressing what they perceived to be normative differences between horizontal and vertical restraints, have determined that the particular restraint involved "a single manufacturer and

a single dealer" and have refused to apply the label of a "group boycott." *See, e.g.,Westman Comm'n Co. v. Hobart Int'l, Inc.,*796 F.2d 1216, 1223-4 & n. 1 (10th Cir. 1986), *petition for cert. filed,* 55 U.S.L.W. 3259 (1986); *Terry's Floor Fashions v. Burlington Industries,* 763 F.2d 604, 611 & n. 12 (4th Cir. 1985); *Oreck Corp. v. Whirlpool Corp.,*579 F.2d 126, 131 (*en banc*), *cert. denied,*439 U.S. 946 (1978). These cases often characterize the refusal to deal as stemming from a decision by the supplier or manufacturer and the courts analogize the restraint to an "exclusive distributorship" or "sole outlet." *See, e.g., Terry's Floor Fashions,* 763 F.2d at 611 & n.12. Indeed, in this case the district court created a "de facto exclusive distributorship" as a means of characterizing the structure of the relationship between Gourmet and the supplier. App. B-. Finally, some courts have held that the per se rule may be applicable to dealer-coerced boycotts only where the termination results from price-fixing motivations by the supplier and complaining dealer. *See, e.g., Westman Comm'n Co.,* 796 F.2d at 1225.

These formulations miss the mark and result in formalistic chacterizations of the parties relationship—i.e., whether vertical or horizontal—dictating the determination of the restraint's legality under the antitrust laws. This Court has rejected the notion that antitrust policy should be dictated by the parties relationships rather than the economic and competitive realities and effects of the restraining behavior. *Continental T.V., Inc.* v. *GTE Sylvania*, 422 U.S. at 59. In these types of cases, the nomenclature and structure of the actors' relationship can have a bearing on the inferences that may properly be drawn. However, that structure should not dictate the decision on the restraint's ability to advance, or retard, the competitive objectives of the antitrust laws.

The cases holding that the per se rule is, or may be, applicable to dealer-coerced boycotts are premised on greater judicial awareness of competitive pressures in the marketplace and the social and economic utility of coercive practices by distributors. In *Cernuto, Inc. v. United Cabinent Corp.,* 595 F.2d 164, 168 (3d Cir. 1979), the court stated that "[w]hen a marketing decision, although

ostensibly taken by a manufacturer, is in fact the result of pressure from another customer, such a decision must be scrutinized more closely than solely unilateral action might be." The courts have applied traditional factors of purpose and effect in determining whether a dealer-coerced boycott is aimed at, or capable of, achieving anticompetitive impacts. For example, in *M & M Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 972, 979 (1st Cir. 1984), the court inquired whether the complaining dealer "orchestrated" the exclusionary practice to drive its competitor out of business or whether the practice was related to legitimate sports objectives.

Perhaps the most thorough case applying the per se rule to dealer-coerced boycotts is *Com-Tel, Inc. v. DuKane Corp.*, 669 F.2d 404 (6th Cir. 1982). In that case the court held that the boycotting activity was felt at the horizontal level, even though most of the economic pressure was exerted vertically. 669 F.2d at 411. The court rejected the contention that a manufacturer would achieve distribution efficiencies through an arbitrary decison to exclude one customer from access to its goods. *Id.* at 411-12. The court also concluded that where the impact and objective of the refusal to deal is exclusion of a horizontal competitor, "there are no benefits from increased interbrand competition" resulting from the vertical restriction. *Id.* at 412.

Clearly, the circuit courts of appeal which have examined the objectives commonly sought, and the market effects realized, by dealer-coerced boycotts and have concluded that those restrictions seldom achieve proper results, have formulated a bright line rule which best advances the purposes of the antitrust laws. The better rule, therefore, condemns as facially unreasonable or per se illegal any refusals to deal which are imposed, demanded or coerced by a competing dealer.

B. The Precedent of this Court Requires Application of the Per Se Rule. This Court, in a number of relevant cases, has held that conduct which has as its purpose or effect the elimination of a competitor or the intentional creation of barriers or impediments to competition is to be facially condemned. *Klor's, Inc. v. Broadway-*

Hale Stores, 359 U.S. 207 (1959); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Associated Press v. United States*, 326 U.S. 1 (1945). More recently, in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 290 (1985), the Court stated that the per se rule is properly applicable to concerted refusals to deal which "are so likely to restrict competition without any offsetting efficiency gains."[7] These standards apply with compelling force to dealer-coerced refusals to deal and such restraints should be condemned as per se illegal.

The Court of Appeals held that the holding and reasoning of the *Klor's, Inc.* case were inapplicable to this case. The court's opinion, however, fails to perceive the more subtle implications of the *Klor's, Inc.* decision. *Klor's, Inc.* is a case which arose on the district court's ruling granting summary judgment. The plaintiff, a merchant of electronic equipment and appliances, was refused product, or sold product at a discriminatorily higher price, by ten national and international manufacturers of equipment and appliances and several regional distributors of such equipment. The complaint and the allegations of record in the case reveal the plaintiff's "boilerplate" pleading of a conspiracy between and amongst all the defendants. The substance of Klor's cause of action, however, was its belief that its powerful competitor, Broadway-

[7]The Court in *Northwest Wholesale Stationers, Inc.* defined the standard for deciding which exclusionary restraints require per se treatment:

> Cases to which this Court has applied the per se approach have generally involved joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers of customers to deny relationships the competitors need in the competitive struggle." (citing L. Sullivan, Law of Antitrust, pp. 261-2, and several cases). In these cases, the boycott often cut (sic) off access to a supply, facility, or market necessary to enable the boycotted firm to compete, * * *and frequently the boycotting firms possessed a dominant position in the relevant market. * * *In addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive. Under such circumstances the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote.

472 U.S. at 294 .

Hale, was able to exercise its bargining power over the manufacturers and suppliers to gain their agreement to refuse dealings with Klor's. Because the defendants filed dismissal motions contending that Klor's had failed to allege an public, rather than merely personal injury from the challenged conduct, the courts were not called upon to determine the plausibility of Klor's claim. However, Lomar argued to the Court of Appeals that the *Klor's* case must stand for the proposition that a group boycott claim may be made out by proof that a powerful buyer induced a number of suppliers to cut off trade with the victim, the buyer's competitor. The Court of Appeals rejected Lomar's interpretation of the *Klor's* case and held that decision requires proof of some horizontal agreement to establish a per se illegal group boycott. App. A-16.

The rationale of the *Klor's* case is important here because the boycott held illegal in that case is virtually identical in its purpose, its impact on competition, and the source of its anticompetitive animus to the boycott implemented by Gourmet. The only difference between the cases is Klor's implausible allegation that ten large manufacturers agreed with each other, after being coerced by Broadway-Hale, to refuse to trade with Klor's. Obviously, the antitrust laws have traditionally shown greater concern over agreements among competitors, but there is no holding of this Court which concludes that all restrictions applied between vertically-related parties are analyzed under the rule of reason.

This case, then, presents a logical extension of this Court's decision in *Klor's* and would require that the per se rule be applied to concerted refusals to deal which are implemented or coerced by a dominant dealer for the purpose of destroying a competitor or making it more difficult for that competitor to compete. An extension of the rule in *Klor's* to dealer boycotts would not impair procompetitive conduct in distribution or interbrand markets and might result in conpetitive effects in those markets.

C. Justifications, Judicial Experience and the Gourmet Boycott. There are two related principles implicated in this case. First, to warrant application of the per se rule, a challenged practice

must be devoid of pro-competitive justifications and must, in most situations, stem from anticompetitive objectives or result in competitive harms. Second, to justify facial or per se condemnation of some business behavior, the courts must have had sufficient experience with the behavior to permit such summary treatment. *See NCAA v. Board of Regents of University of Oklahoma,* 468 U.S. 85 (1984); *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978); *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959). This case presents the Court with an opportunity to conclude that the courts have had sufficient experience with this form of restraint and to find that dealer-coerced boycotts have procompetitive attributes which occur infrequently and possess modest dimensions. Moreover, the boycott imposed by Gourmet illustrates the harms occasioned by judicial use of the rule of reason in analyzing this type of restraint.

In the first place this case does not involve the use of any exclusive distribution arrangement and application of the per se rule does not present risks of interfering with legitimate, pro-competitive vertical nonprice restrictions. *See Carlson Machine Tools, Inc. v. American Tool, Inc.,* 678 F.2d 1253, 1259 (5th Cir. 1982). The policy of this Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36 (1977), would not be retarded by recognizing the overriding anticompetitive effects of dealer-coerced boycotts. Indeed, the *Continental T.V.* Court expressly pointed out that its application of the rule of reason to the vertical nonprice restraint examined in that case did not affect the proper application of the per se rule in appropriate cases. *Id.* at 58 & n. 28.

The per se rule is properly applied in these cases for a couple of reasons. First, and contrary to the finding of the Court of Appeals, there are few, if any, pro-competitive manifestations which usually arise from blatant dealer boycotts. Unlike true exclusive distributorships, a dealer boycott has as its principal purpose the elimination of competition from another dealer. VII Areeda, *Antitrust Law,* ¶1453 at 144. These arrangements, in most applications, are not designed to reduce intrabrand competition in order to

stimulate interbrand competition, which is an objective a manufacturer could achieve by implementing vertical non-price restraints. *Cernuto, Inc.*, 595 F.2d at 168. A dealer seeking to persuade or coerce a manufacturer or supplier to terminate a competing dealer does so for non-competitive reasons, such as a fear of price competition, and the competitive effects of dealer demands to terminate a competitor are more likely to be negative. VII Areeda, *Antitrust Law*, ¶1457 at 167. Contrary to the assertion of the Court of Appeals, there is no substantial reason to believe that distributors have generalized pro-competitive interests in interbrand competition when they are seeking to persuaded an otherwise disinterested supplier into taking some restrictive actions which the supplier either hadn't thought of or had previously considered but rejected. *See* VII Areeda, *Antitrust Law*, ¶1457 at 168.

In this regard it must be kept in mind that a rule of per se illegality cannot retard a manufacturer's development of an effective marketing strategy; the rule merely prohibits a dealer from making the decision to preclude competition in it's trade area and imposing that decision on the manufacturer. Moreover, the rule may reduce the costs associated with product distribution and thereby enable suppliers to distribute products cheaper.[8] It has been noted that dealer coerced boycotts may be imposed to exclude rivals by making access to necessary products more costly for them. Krattenmaker & Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price, 96 Yale L.J. 205, 234-8 (1986). To the extent that a per se rule provides a clear and predictable rule, and thereby permits greater commercial guidance, manufacturers are counseled into unilaterally designing market strategies and against reliance on questionable advice from

[8]There are, of course, certain difficults to be encountered in establishing acceptable levels of proof distinguishing coercive behavior from a supplier's acquiescence in the dealer's demands. As a matter of antitrust policy, however, dealer generated restraints are much more likely to generate anticompetitive results than supplier generated restraints. VII Areeda, *Antitrust Law*, ¶1453 at 144. Therefore, the importance of the distinction between coercive dealer conduct and passivity by the supplier lies in its ability to create inferences about the competitive effect of the subsequent termination and the source of the restraint. *See Cernuto*, 595 F.2d at 164.

a self-interested dealer. There is simply no reason to believe, as the Court of Appeals did in this case, that competition policy will be advanced by permitting suppliers to rely a dealer as a "distribution 'expert'" in eliminating other dealers.

In the second place, and contrary to the Court of Appeals' supposition, facial invalidation of the dealer boycott in this case does not present insuperable adminstrative details. The traditional factors of purpose and effect, which have long been applied by this Court in determining whether a restraint should be analyzed under the per se rule and in characterizing a restraint, are available to assist courts in deciding whether a particular restraint is a boycott or some other less pernicious form of behavior. More fundamentally, the source of a particular restraint—whether imposed by a dealer to impede competition at the dealer level or from a supplier to improve prospects for interbrand competition—is a very useful way of approaching judicial decision-making on the actual or probable anticompetitive effects of a restraint.

Finally, Lomar resists the implication of the lower courts' decisions that the courts are not up to the task of determining the plausibility of a dealer coercing or inducing a manufacturer into terminating another dealer solely for the purpose of destroying competition at the intrabrand or distribution level. In the first place, the courts can examine the evidence for expressions of the dealer's intention to eliminate competition. *Cernuto*, 595 F.2d at 164. For example, in this case the district court found that there was evidence from which "a jury could reasonably find that [Gourmet] and Art Stone had a goal of eliminating or weakening Lomar as a competitor. . ." Second, this Court recently identified a more generalized analysis for determining whether a firm has sufficient market power to inflict competitive harm. *FTC v. Indiana Federation of Dentists*, __U.S.__, 106 S.Ct. 2009 (1986). While proof of a dealer's economic power to force compliance by a manufacturer or supplier is not a necessary condition of applying the per se rule, proof of actual or probable competitive effects will assist the court in concluding that a dealer boycott will harm competition in the

market for dealer services. VII Areeda, *Antitrust Law,* ¶1457 at 171. Similarly, evidence that the supplier had unilaterally designed an optimum distribution plan prior to receiving the dealer's demand that its competitor be terminated creates a powerful inference that the termination resulted from the supplier's unilateral decision to improve the interbrand competitiveness of its product. *Id.*

In this case there was ample evidence to conclude that Gourmet coerced, or otherwise induced, the three suppliers to refrain from establishing or maintaining trade relations with Lomar because Gourmet loathed the competitive influence that Lomar exerted in their jointly shared marketing area. Furthermore, there is no evidence that the suppliers utilized, or unilaterally designed, vertical restrictions which compelled termination of Lomar to create "elbow room" for Gourmet or any other distributor. There is no reason why a rule of reason should be used to assess the competitive virtues of these restraints. This Court's ruling in the *Klor's* case compels the conclusion that the per se rule should be applied to dealer-coerced boycotts in general, and Gourmet's boycotting activity in particular.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE THE APPROPRIATE STANDARD FOR REVIEWING CLAIMS THAT A DEALER COERCED A SUPPLIER TO TERMINATE A COMPETING DEALER FOR PRICE FIXING REASONS

There is another reason why this Court should grant certiorari in this case. The Court of Appeals failed to formulate and apply a rule against dealer-coerced boycotts which are implemented for reasons related to the boycott victim's active price competition with the complaining dealer. This issue of general, but not insubstantial, importance has received varying treatment by the courts and

this Court's articulation of a consistent and well-reasoned rule is necessary.

The appellate courts have been unable to uniformly apply an analysis which is consistent with the objectives of the antitrust laws to situations in which a terminated dealer claims that his or her termination was due to a competing dealer's ability to coerce a supplier to cease dealing with the victim dealer. The courts have become mired down in attempts to reconcile this Court's decisions in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) and *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). The two cases represent very different interpretations of federal antitrust policy and care is needed to separate the meaning of each. Several courts, in an effort to define the conspiracy requirement in vertical price fixing cases, have construed the *Monsanto* decision as requiring proof of an explicit price fixing agreement or, at a minimum, some list of prices to which the supplier required dealer adherence. *See, e.g., Westman Comm'n Co.*, 796 F.2d at 1224; *Business Electronics Corp. v. Sharp Electronics Corp.*, 780 F.2d 1212, *cert. granted*, __U.S.__; *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323 (8th Cir.), *petition for cert. filed*, 55 U.S.L.W. 3495 (1986). Another line of appellate court cases holds that this Court's traditional distain for price fixing, and its cases which define price fixing as any activity which has the purpose or effect of stabilizing prices, requires that the price fixing label apply to dealer terminations taken to relieve a complaining dealer of price competition. *See, e.g., Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1338-9 (3rd Cir. 1987); *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1476-7 (10th Cir. 1985); *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 474 (3d Cir. 1985). These latter cases best promote the important objectives of the antitrust laws because they recognize the paucity of pro-competitive justifications for dealer terminations which are inspired or coerced by a competing dealer to relieve price competition.

This case classically presents two situations— one involving Chicago and another involving DG—in which an active, price-com-

peting dealer was terminated because its competitor disliked the competition. This type of conspiratorial action presents a far more dangerous restraint on competition than the supplier-originated action in cases like *Monsanto.* As one commentator has pointed out, where the restraint originates from the supplier, it is more likely that the purpose of the restraint is to seek more efficient distribution; where, however, the supplier acquiesces to a buyer's demand that the supplier refuse dealings with the buyer's rival, the complaining buyer is most likely seeking excess profits. VII Areeda, *Antitrust Law* ¶ 1457 at 175 (1986).

The rulings of the lower courts in this case fail to comport with the better reasoned cases and should be reversed. With respect to the DG products, the evidence shows that Gourmet was sufficiently concerned about Lomar's competition to terminate Hakes and then ensure that Hakes could not get direct access to DG goods. Gourmet was sufficiently concerned about Lomar's competition to devise a sham "distribution analysis" as a prelude to DG's refusal to deal with Lomar. Coupled with Gourmet's implausible contention that it had an exclusive distributorship with DG, an assertion firmly rejected by DG, the pretextual "analysis" creates a reasonable inference that DG's refusal to deal with Lomar was due to Gourmet's fear of active price competition by Lomar.

The legitimate inferences of DG's concern about Lomar's price competition are even clearer with respect to Chicago. Art Stone's evening telephone calls to Chicago personnel, creating as they did "chaos" at Chicago's office, came in direct response to Lomar telling an Iowa store that it could "buy Featherweight much cheaper from" Lomar. R.III, p. 443. Again, the inference is clear and compelling, but the lower courts, misperceiving the meaning of *Monsanto* in the context of a boycott for price fixing reasons, erred in applying an improper standard.[9] A jury reviewing the evidence

[9]The Court of Appeals misapplied its own law in attempting to reconcile two decisions, *Victorian House, Inc. v. Fisher Camuto Corp.*,769 F.2d 466 (8th Cir. 1985) and *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*,798 F.2d 323 (8th Cir. 1986) *petition for cert. filed,* 55 U.S.L.W. 3495 (1986), which cannot be reconciled in the context of this litigation. *Victorian House, Inc.*, like this case, involves a

would not be permitted to speculate on Gourmet's motivation for coercing or pressuring DG and Chicago; there is substantial evidence that Gourmet wanted Lomar out of the market because of Lomar's price competition. The issue of Gourmet's price fixing activities should have been submitted to jury. *See Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d at 1339-40.

In considering the combined price and nonprice thrusts of Gourmet's actions against Lomar it becomes clear that the virtues of the Sherman Act's longstanding prohibition of price restraining and exclusionary conduct will be thwarted by permitting the Court of Appeals' decision to stand. The lower courts' errors conflict with the policies crafted by the Court and articulated by other federal courts. Those errors are so fundamental that they create the need for review by this Court.

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claim by a terminated dealer that a competitor dealer demanded his termination because he was discounting and the supplier complied with the demand. Unlike this case, however, there was some evidence that the supplier had independently determined that it was concerned about discounting and sought to curb it. The Eighth Circuit upheld a jury instruction defining price fixing as an agreement to terminate the victim for "price related" reasons. In this case there is no evidence that Chicago or DG independently arrived at any distribution pricing policies, and it is clear that Gourmet was actuated by its concern over Lomar's price competition. The Court of Appeals should have applied its own precedent in a more careful manner and found that there are stronger reasons for finding price fixing than *Victorian House, Inc.*

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Eighth Circuit.

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November 12, 1987

Appendices

Appendix A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 86-1167

LOMAR WHOLESALE GROCERY, INC.,
an Iowa Corporation,
Appellant,

vs.

DIETER'S GOURMET FOODS, INC.,
A California Corporation;
Gourmet Foods, Inc., A Minnesota Corporation;
and Art Stone, President of Gourmet Foods, Inc.,
Appellees.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA**

Submitted: December 10, 1986

Filed: July 13, 1987

Before BOWMAN, Circuit Judge, BRIGHT, Senior Circuit Judge,
and CONMY,* District Judge.

BOWMAN, Circuit Judge.

Lomar Wholesale Grocer, Inc. (Lomar) appeals from two orders of the District Court granting summary judgment in favor of defendants Dieter's Gourmet Foods, Inc. (Dieter's), Gourmet Foods, Inc. (GF) and GF's president, Art Stone. Lomar brought suit against defendants, seeking damages and injunctive relief for alleged violations of both Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 2 of the Robinson-Patman Act, 15 U.S.C. § 13. Lomar charges GF and Stone (hereafter referred to collectively as GF) with conspiring to engage in a group boycott to deny Lomar access to the products of three different grocery suppliers. The complaint also charges GF with engaging in a vertical price-fixing conspiracy in which the suppliers terminated Lomar as a distributor in an effort to protect GF from price competition. Finally, Lomar charges GF with engaging in price-discrimination and with receiving illegal brokerage in violation of sections 2(a) and 2 (c), respectively, of the Robinson-Patman Act. Defendants filed motions for summary judgment as to each of Lomar's Sherman Act claims, and, after a hearing, the District Court entered an order granting the motions. *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 627 F. Supp. 105 (S.D. Iowa 1985) (*Lomar* I) Following additional briefing and argument, the District Court entered an order granting defendants' motions for summary judgment on the Robinson-Patman claims. *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 627 F. Supp. 117 (S.D. Iowa 1985) (*Lomar II*). We affirm each of the orders in all respects.

I.

Lomar and GF are wholesale distributors of specialty food products, selling ethnic, seasonal, dietetic, and other low volume

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*The HONORABLE PATRICK A. CONMY, Chief Judge for the District of North Dakota, sitting by designation.

items to retail grocery outlets. Other specialty food distributors and general grocery wholesalers compete with the two firms for sales of the same products, but the effectiveness of this competition is the subject of sharp dispute. Lomar contends that specialty foods distribution forms a separate product submarket in which Lomar and Gf are the only significant players. GF urges a broader product market definition that would include many more competitors and encompass a variety of comparable products sold by general grocery wholesalers. There is at least some agreement that the state of Iowa and certain contiguous areas comprise the relevant geographic market.

Lomar's complaint stems from its inability to purchase and distribute the products of Dieter's Gourmet Foods, Inc. (Dieter's), Chicago Dietetic Supply, Inc. (Chicago Dietetic) and Celestial Seasonings, Inc. (Celestial). Lomar charges that in an effort to eliminate its competition in the Iowa market, GF entered into a conspiracy with each of these suppliers to foreclose Lomar's access to their products. There is no allegation that the three suppliers conspired among themselves, or that any of the suppliers solicited another's participation in the alleged conspiracy. Rather, Lomar alleges that GF used its substantial national market power as the largest specialty food distributor in the country to coerce each of the suppliers separately into the alleged antitrust violations aimed at Lomar.

The District Court first found that Lomar's Sherman Act claims involving Chicago Dietetic were time-barred. *Lomar I*, 627 F. Supp.

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[1] By stipulation, the parties agreed to try the Sherman Act claims solely on a *per se* theory. Accordingly, Lomar must show that as a matter of law it has alleged one or more Sherman act violations falling within the narrow *per se* category, and that there are disputes of fact material to the resolution of its claims under the *per se* rule. Absent such a showing, summary judgment was appropriate, regardless of any disputed issues of fact that would be relevant to claims propertly evaluated under the rule of reason. *Cf. McCabe's v. La-Z-Boy Chair Co.*, 798 F.2d 323, 329 (8th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3495 (Dec. 29, 1986).

at 109. The court then found that Lomar had failed to present evidence raising genuine issues of material fact in support of its other claims under the Sherman Act.[1] *Id.* at 116. In disposing of the Robinson-Patman claims, the District Court held that Lomar had failed to make a sufficient showing of competitive injury from the alleged price discrimination under section 2(a), or of individual injury from the alleged brokerage payments under section 2(c). *Lomar II*, 627 F. Supp. at 119, 120.

II.

While we generally use summary judgment "sparingly" in antitrust litigation, *Assam Drug Co. v. Miller Brewing Co.*, 798 F2d 311, 317 (8th Circ. 1986) (quoting *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962)), summary procedures are appropriate where the issues for resolution are primarily legal rather than factual. In reviewing the District Court's grant of summary judment in favor of defendants, we apply the same standard as that applied by the District Court. *Kegel v. Runnels*, 793 F.2d 924, 926 (8th Cir. 1986). Accordingly, we must determine whether there are any genuine issues of material fact which would entitle Lomar to a trial of its claims. Fed. R. Civ. P. 56(c). In making this determination, we "view the facts and all reasonable inferences derived therefrom in the light most favorable to the nonmoving party." *Green v. United States Dept. of Labor,* 775 F.2d 964, 973 (8th Cir. 1985). Rule 56 does not require us to submit for trial all those claims about which the parties have some factual dispute. Issues of fact must be *material* to a resolution of the dispute between the parties; where the only disputed issues of fact are immaterial to the resolution of the legal issues, summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). We note that defendants here have supported their motions with "pleadings, depositions, answers to interrogatories . . . admissions [and] affidavits" as provided in Rule 56(c). Lomar, which bears the burden of proving its antitrust claims at trial, therefore may not

rest merely on the conclusory allegations contained in its pleadings and legal memoranda. Rather, by affidavits or otherwise, it must point to specific evidence showing that there are *genuine* disputes of material fact that must be resolved before its claims can be decided. *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552-53. (1986). With these considerations in mind, we review the record with respect to each of Lomar's claims.

Statute of Limitations: Chicago Dietetic Products

Lomar filed this suit against GF on August 30, 1979. In August 1981, Lomar amended its complaint and for the first time alleged a conspiracy between GF and Chicago Dietetic. The amended complaint alleged Sherman Act violations in connection with Chicago's termination of Lomar as a distributor of its Featherweight line of products on March 5, 1976, and with Lomar's subsequent inability to purchase the products between 1976 and 1980. Defendants moved for summary judgment on the Chicago Dietetic claims, arguing that claims based on the 1976 termination were time-barred by the four-year statute of limitations on private actions contained in 15 U.S.C. § 15(b).

In granting the motions, the District Court rejected Lomar's argument that the amendment related back, under Fed. R. Civ. P. 15(c), to the filing of the first complaint. *Lomar I*, 627 F. Supp. at 107-08. The court also rejected Lomar's alternative argument that the new claims were not time-barred because they alleged a "continuing conspiracy" under *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321 (1971). *Lomar I*, 627 F. Supp. at 108-09. On appeal, Lomar has dropped its Rule 15(c) argument, and we do not address it here. Lomar continues to argue, however, that Chicago Dietetic's refusal to deal with Lomar between 1976 and 1980 involved acts in furtherance of a continuing conspiracy occurring during the statutory period. We disagree and hold that the District Court did not err in ruling that Lomar's claims against

In *Zenith Radio*, the Supreme Court held that a continuing conspiracy may extend the statutory period on private antitrust actions, because a cause of action arises each time the plaintiff is injured by an overt act of the defendant in furtherance of the unlawful conspiracy. 401 U.S. at 338. In *Pioneer Co. v. Talon, Inc.*, 462 F.2d 1106 (8th Cir. 1972), we held that in the context of a refusal to deal, a supplier's rejection of a specific order placed by a boycotted distributor constitutes an overt act within the meaning of *Zenith Radio*, at least where the distributor has no specific distributorship contract which the supplier finally and unequivocably has terminated. The distributor in *Pioneer* had no such contract, and even though the supplier had informed the distributor of its "termination" more than four years before the action was filed, we held that the supplier's subsequent refusals to accept specific orders placed within the statutory period "caused new injury to [the distributor] each time an order was refused." 462 F.2d at 1109. *Compare David Orgell, Inc. v. Geary's Stores, Inc.*, 640 F.2d 936, 937 (9th Cir.) (subsequent refusals to deal, even within the statutory period, are not overt acts giving rise to new causes of action where plaintiff's requests are merely "forlorn inquiries by one all of whose reasonable hopes had been previously dashed"), *cert. denied*, 454 U.S. 816 (1981); *see also In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 72 (9th Cir.) (initial refusal to deal was "irrevocable, immutable, permanent and final"), *cert. denied*, 444 U.S. 900 (1979). *But see Hennegan v. Pacifico Creative Service, Inc.*, 787 F.2d 1299, 1300-01 (9th Cir. 1986) (payments by souvenir vendors to tour operators and operators' shepherding of tourists away from plaintiff's competing souvenir shop constitute "overt acts"), *cert. denied*, 107 S. Ct. 179 (1986).

In 1978 and 1979, employees of Remco, Ltd., a broker for Chicago Dietetic, requested that Chicago Dietetic reinstate Lomar as a distributor of Chicago Dietetic's products. Lomar alleges that the brokers made the requests "[o]n Lomar's behalf and for the benefit of Lomar," Brief of Appellant at 39, and that Lomar's president knew and approved of the requests. Reply Brief of

Appellant at 16. Lomar argues that the brokers' inquiries were tantamount to Lomar's placing specific orders and that Chicago Dietetic's unfavorable responses to the requests "were either continuing effects of the earlier termination or fresh instances of a Gourmet-inspired refusal to deal." Brief of Appellant at 39-40. In an appropriate case, the distinction between "continuing effects" and "fresh instances" could be critical. The former are "merely the abatable but unabated inertial consequences of some pre-limitations" conduct, and they do not give rise to new causes of action. *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117, 128 (5th Cir. 1975) ("It remains clear . . . that a newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period."), *cert. denied*, 423 U.S. 1054 (1976) and 425 U.S. 971 (1976). In contrast, "fresh instances" suggest new refusals to fill specific orders, which would bring the conduct within our holding in *Pioneer*, and compel a similar result here.

In this case the distinction is without significance, because we agree with the District Court that the inquiries made by the Remco brokers do not constitute specific orders for goods by Lomar. Lomar admitted that it did not place any orders for, or otherwise attempt to obtain, Chicago Dietetic products during the statutory period. I Joint Appendix of Record Excerpts (App.) at 157-58. Moreover, nothing in the record suggests that Lomar requested the two Remco brokers to make the inquiries on Lomar's behalf. The joint affidavit of the two Remco brokers merely asserts that the brokers "put pressure" on Chicago Dietetic to sell to Lomar during 1978 and 1979 as a means of increasing sales of Chicago Dietetic products, Addendum to Brief of Appellant at 53, and notes that Lomar "was aware" of the initially unsuccessful efforts.[2] *Id.* at 54. Such general inquiries initiated by third parties, even if congruent with Lomar's own interests, do not constitute specific orders for goods and do not give

[2] Lomar was reinstated as a Chicago Dietetic distributor in 1980.

rise to an overt act of refusal that causes Lomar a separately actionable antitrust injury. In addition, the brokers' affidavit suggests that Chicago Dietetic's reaction to the inquiries was merely the residual effect of the earlier refusal to deal. The Chicago Dietetic representative contacted by the brokers "declined to push the matter with his superiors," apparently believing that they "would not go along with such a proposal because Lomar had caused them problems at an earlier time when Lomar had not stayed within certain territorial sales boundaries as set forth by Chicago Dietetic." *Id.* at 53.

The situation here resembles that in *Barnosky Oils, Inc. v. Union Oil Co.*, 665 F.2d 74 (6th Cir. 1981). In *Barnosky*, the Sixth Circuit upheld the dismissal of a Sherman Act price-fixing claim brought by an oil jobber who resold to individual retailers gasoline purchased from the defendant. The complaint alleged that Union Oil illegally had coerced Barnosky into terminating gasoline sales to a price-cutting retailer. The court held that an action brought in 1977 was time-barred as to the 1971 agreement to terminate the retailer, even though "Union continually enforced the 1971 agreement." *Id.* at 81. Observing that Barnosky never requested permission to sell gasoline to the terminated retailer during the limitations period, *Id.*, the court concluded that "Barnosky may have suffered, and Union may have benefitted, from the consequences of Union's conduct during the limitations period [but this] does not render the act a continuing violation of the antitrust laws." *Id.* at 82. Here, Lomar made no additional demand upon Chicago Dietetic which might give rise to a new injury. Rather, "the injury, if any, experienced by Lomar is part of the continuing injury that was caused by its termination as a distributor." *Lomar I*, 627 F. supp. at 116.

In the alternative, Lomar argues that actually submitting orders for Chicago Dietetic products would have been futile. Relying on *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 377 F.2d

776, 781 (3d Cir. 1967), *aff'd in relevant part, rev'd in part on other grounds*, 392 U.S. 481, 487 n.5 (1968), Lomar contends that the futile orders need not have been made to establish the requisite continuing acts under *Zenith Radio.* This argument is without merit because it confuses the evidence necessary to establish the plaintiff's standing to bring an antitrust action with the evidence necessary to show that within the statutory period the plaintiff was injured by an overt act in furtherance of a continuing conspiracy. The former involved a showing of antitrust injury, without regard to the time of its occurrence, while the latter involves a showing that the plaintiff suffered injury within the four-year period preceding the filing of its claim.

In *Hanover Shoe*, the Third Circuit noted that "it would be ironic as well as idle to require the victim of the monopoly to make an explicit demand the denial of which was implicit in the continuance of the monopoly." 377 F.2d at 781. Because Hanover was a "'captive customer'" of United, and "was well aware of United's power as the supplier of machinery and of its policy against sales," the Third Circuit held that a futile demand by Hanover was not necessary to establish that Hanover was coerced into accepting shoe manufacturing machines under a "lease-only" policy, when it would have preferred to buy the machines outright. *Id.; see also Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739, 743 (9th Cir. 1984) (futile demand not necessary to establish injury, and hence standing, on boycott claim.) The *Hanover Shoe* futility doctrine, however, does not relieve a plaintiff of the burden of showing that a specific act of the defendant caused injury to the plaintiff within the statutory period. "It is not sufficient that the plaintiff may have suffered damages caused by the defendant's violation within the limitation period;" *Zenith Radio* requires "an overt act in furtherance of an antitrust conspiracy . . which is committed within the limitations period." *Lancianese v. Bank of Mount Hope*, 783 F.2d 467, 470 (4th Cir. 1986).

The Third Circuit addressed the statute of limitations question in a separate portion of the *Hanover Shoe* opinion.[3] There, the court rejected United Shoe's contention that Hanover could not recover for a refusal to deal occurring outside the limitations period, "even for damages following the reiteration of such a refusal to deal within the statutory period." 377 F.2d at 794 (Supplemental Opinion). The court noted that United had gone beyond a mere continuation of the "lease-only" policy. By collecting payments from the coerced lessees and by entering into new leases as equipment needed to be replaced, United had committed separate acts in furtherance of its illegal policy within the statutory period. *Id.* at 794. As the court observed, "where the repeated and measureable invasion of a plaintiff's rights occurs both outside the statutory period and also within it, the fact that some of the injury and damage occurred outside the statutory period does not affect the plaintiff's right to recover for *the separate invasion of its rights which occurred within the period.*" *Id.* at 795 (emphasis added). We do not find in this language any support for Lomar's argument.

The law does not require Lomar to make a futile demand of Chicago Dietetic to demonstrate that Lomar was injured by the supplier's refusal to deal. However, this does not relieve Lomar of its burden, in alleging a continuing conspiracy, of showing that it "was injured by an act of the defendants occurring within the statutory period. *Zenith Radio*, 401 U.S. at 338. Here, Lomar has shown no overt act constituting a separate invasion of its rights during the four years prior to the filing of this action. Whatever injury it suffered flowed from its 1976 termination by Chicago Dietetic, and this portion of its complaint is now time-barred. Accordingly, we hold that the District Court did not err in granting

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[3] Although the present statute of limitations contained in 15 U.S.C. § 15(b) did not apply to the action in *Hanover*, the court's disposition of United Shoe's arguments with respect to the issue is instructive. If the futility of Hanover's demand during the statutory period were a complete answer to both the standing and the statute of limitations questions, the court's separate discussion of the latter would not have been necessary.

GF's motion for summary judgment with respect to Lomar's claims involving Chicago Dietetic.

Vertical Price Fixing

After an unsuccessful attempt in 1975 to purchase grocery products directly from Dieter's, Lomar had been purchasing the products from M & JR Hakes, Inc. (Hakes), a general grocery warehouse concern. Hakes' own source of the Dieter's products had been GF, but upon discovering the resales to Lomar in 1976, GF unilaterally terminated its sales of the products to Hakes. Between 1976 and 1979, Lomar purchased Dieter's products through another food distributor, but in March 1979 that distributor was acquired by another competitor of Lomar's, which also then refused to sell Dieter's products to Lomar. In early 1979, Lomar again submitted an order directly to Dieter's. After consultation with GF, Dieter's responded to the order by informing Lomar that a market survey would be conducted to study the need for an additional distributor of Dieter's products in the area and that Lomar's order would be held for six months pending the outcome of the survey. Lomar filed this lawsuit before the end of that six-month period, alleging that Dieter's refusal to sell to Lomar was related to Lomar's price-cutting, and was the product of a conspiracy between GF and Dieter's to protect GF from price competition.

Lomar alleges that Dieter's response to its 1979 order was pretextual. According to Lomar, Dieter's already had agreed at GF's insistence to refuse to deal with Lomar. Based on the evidence submitted in support of this claim, the District Court concluded:

> The Court can find that Gf had the power to veto applications by other distributors to obtain a distributorship in its territory, can find that the market study was a pretext designed to camouflage the decision which had already been made by GF and Dieter's to refuse to deal with Lomar, can find that GF was a powerful force in the market, can find that GF did not have an "exclu-

> sive distributorship" with Dieter's, and can find that GF raised its prices after Lomar was unable to buy Dieter's products. Yet none of these facts give rise to the inference that there was a price-fixing conspiracy between GF and Dieter's.

Lomar I, 627 F. Sup. at 115. On appeal, Lomar argues that the District Court ignored evidence that GF was extremely concerned about Lomar's price cutting. According to Lomar, evidence of this concern, in combination with the other evidence referred to by the District Court in the above-quoted language, establishes a triable case of vertical price fixing.

We agree with the District Court that Lomar failed to produce evidence from which it reasonably could be inferred that "GF and Dieter's took concerted action with the *common purpose to fix prices*." *Id.* As observed by the court below, *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984), specifically rejected the argument that a price fixing agreement can be "inferred merely from complaints by distributors to the manufacturer about price-cutting distributors and the fact that termination came about in response to such complaints." *Lomar I*, 627 F. Supp. at 115. As this Court has observed, *Monsanto* means that "for a terminated dealer to prevail on its per se [price fixing] claim, the evidence must be sufficient for the jury to determine not merely that the manufacturer and nonterminated dealer conspired," but that the conspiracy was price-related. *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323, 329 (8th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3495 (Dec. 29, 1986).

Lomar has pointed to nothing in the record even remotely suggesting that Dieter's shared GF's alleged price concerns. Instead, Lomar refers us to *Victorian House, Inc. v. Fisher Camuto Corp.*, 769 F.2d 466 (8th Cir. 1985), and attempts to revive the standard rejected in *Monsanto*. In *Victorian House*, we applied a *per se* rule to an apparel retailer's claim that its termination as a

distributor of the defendant's line of shoes was the result of a price-related conspiracy between the defendant and the defendant's distribution agent (who was also a competing retailer). There, the defendant had announced a new policy of refusing to deal with retailers who conveyed a "bargain basement" or "discount" image. *Id.* at 467-68. The distribution agent had recommended the plaintiff's termination under this policy, and following its own inspection of the plaintiff's store, the defendant complied. *Id.* at 468. The evidence also showed that the distribution agent previously had complained to the defendant about the plaintiff's pricing and had threatened to terminate the plaintiff if it did not raise its prices. *Id.* at 469. Based on this evidence, we held that the jury reasonably could have concluded that the distribution agent was acting in pursuit of his own interest as a competitor of the plaintiff, and that the plaintiff "did not actually meet the termination criteria" established under the new marketing policy. *Id.* Moreover, we found that the jury also could have concluded that the distribution agent had secured the defendant's cooperation in a plan to reduce price competition by terminating the plaintiff. *Id.* at 469-70.

Lomar argues that the six-month market study proposed by Dieter's here was pretextual, and that GF already had secured Dieter's cooperation in the plan to terminate Lomar for price reasons. According to Lomar's reading of *Victorian House*, evidence that GF was concerned about price competition and that Dieter's consulted GF before responding to Lomar's 1979 order supports the inference that the two firms were engaged in an illegal conspiracy to stabilize prices.

We distinguish *Victorian House* from the undisputed material evidence here. In *Victorian House*, the supplier's new marketing policy explicitly included a focus on its retailers' pricing policies, and was intended to curb distribution of its product through discounting retailers. The significance of the supplier's own con-

cern with retail pricing was illustrated further by the timing of the plaintiff's termination. The termination followed the supplier's inspection of the plaintiff's premises, where the supplier saw firsthand that the plaintiff met only the discounted pricing element of its various "termination criteria." *Id.* at 468. these additional factors made plausible the jury's conclusion that the supplier and competing retailer had a *common* commitment to stabilize the price of goods sold by retailers. *Id.* at 469. Here, there is no such evidence of Dieter's concern with Lomar's prices. Lomar merely asserts that GF's own price concerns should be imputed to Dieter's. We do not believe it appropriate to impute such motives to Dieter's, absent a sufficient demonstration of its own concern with Lomar's pricing. Indeed, the evidence of Dieter's motives is even less persuasive than the evidence presented in *McCabe's*, where a variety of factors, including price, were shown to have motivated the supplier to terminate the plaintiff. 798 F.2d at 330. However, the evidence of the supplier's price concerns in *McCabe's* still did not "'tend [] to exclude the possibility that the manufacturer and nonterminated dealer' were motivated by nonprice concerns," and we therefore held that the evidence of vertical price fixing was insufficient to submit to a jury on a *per se* rule. *Id.*, (quoting *Monsanto*, 465 U.S. at 764). Here, there is no evidence whatsoever of Dieter's motives. In these circumstances, both *Monsanto* and *McCabe's* prohibit application of the *per se* rule. Therefore, we hold that the District Court did not err in granting summary judgment against Lomar on its vertical price-fixing claim.

Group Boycott

Lomar based its group boycott claim on essentiallly the same facts alleged in support of its price-fixing claim. Lomar's counsel conceded at oral argument that for purposes of defendants' summary judgment motion, the factual issues pertaining to the boycott claim are not seriously in dispute. However, unlike a vertical restraint, a group boycott, if it exists, will be subject to *per se*

analysis without regard to the presence or absence of a price-related motive. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 290 (1985). Lomar has not alleged that the suppliers contracted, combined, or conspired among themselves, but rather that GF separately coerced each of the suppliers into boycotting Lomar. The District Court accordingly characterized the alleged group boycott as "a rimless, spoked wheel, with GF and Art Stone as the hub and each of the three manufacturers as a spoke." *Lomar I*, 726 F. Supp. at 111. Hence, the sole issue for our resolution on this claim is a legal one — whether a distributor's separate conspiracies with several suppliers to deny a competing distributor access to the suppliers' products constitutes a group boycott.

Lomar argues that the application of the *per se* rule in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), compels a similar result in this case. We disagree, and hold that refusals to deal involving no concerted action between horizontal competitors do not constitute *per se* unlawful group boycotts. Rather, the refusals should be treated as vertical restraints, and will be subject to rule-of-reason analysis unless the refusals are price-related, *cf. Monsanto*, or are designed to enforce underlying restrictions that would otherwise be subject to *per se* analysis, *see, e.g., Jefferson Parish Hospital Dist. No. 2 v. Hyde,* 466 U.S. 2, 9-11 (1984) (certain tying arrangements).

Our analysis of Lomar's group boycott claim begins with the conduct found unlawful in *Klor's*. There, the Supreme Court applied the *per se* rule to a small retailer's group boycott claim which alleged a conspiracy between a number of major appliance manufacturers and Broadway-Hale, a competing retailer. The complaint alleged that the manufacturers had "conspired *among themselves* and with Broadway-Hale either not to sell to Klor's or to sell to it only at discriminatory prices and highly unfavorable terms." 359 U.S. at 209 (emphasis added). The Court observed that the allega-

tions disclosed a classic group boycott, long held forbidden by the antitrust laws. *Id.* at 212. However, the Court specifically distinguished the group boycott in that case from an exclusive distributorship, noting that the plaintiff's complaint alleged "a wide combination consisting of manufactuers, distributors and a retailer." *Id.* at 213.

Despite this language in *Klor's*, Lomar argues that the plaintiff there alleged a conspiracy involving a single competitor organizing a conspiracy with several suppliers. According to Lomar, the briefs of the parties in *Klor's* demonstrate that "the theory of Klor's case was that Broadway-Hale used its buying power to obtain agreements from each manufacturer to cease dealing with Klor's," and that, like Lomar, Klor's did not allege a horizontal conspiracy among the various manufacturers. Reply Brief of Appellant at 13. We question the validity of interpreting the clear language of the *Klor's* opinion by reference to the litigants' briefs. However, we note that the plaintiff in *Klor's* specifically alleged "a conspiracy between all the respondents," Brief of Petitioner at 30, *Klor's*, that was the result of their "contracting, combining, conspiring together, and each with the other." *Id.* at 7. The same brief noted further that the public injury alleged in Klor's complaint was "the entry into this conspiracy *by otherwise competitive firms* . . . . *Id.* at 30 (emphasis added). This language reinforces the distinction drawn by the District Court in refusing to apply *Klor's* to the present case. As the court observed, "[i] n *Klor's*, there was an obvious horizontal character to the conspiracy . . . In the present case, the combinations are only vertical in character." *Lomar I,* 627 F. Supp. at 113. We therefore decline to read *Klor's* as requiring application of the *per se* rule to the present case.

Because *Klor's* does not govern our analysis, we must look elsewhere for guidance in deciding whether the *per se* rule should apply to Lomar's boycott claim. The Supreme Court has instructed us to apply the *per se* rule to a business practice only when the

practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979). The Court "has long held that certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as *per se* violations of § 1 of the Sherman Act." *Northwest Wholesale Stationers*, 472 U.S. at 290 (citing cases). However, the court also has held that "[t] he mere allegation of a concerted refusal to deal does not suffice [to invoke the *per se* rule] because not all concerted refusals to deal are predominantly anticompetitive." *Id.* at 298. Moreover, we have been instructed not to expand indiscriminately the category of restraints classified as group boycotts. *FTC v. Indiana Federation of Dentists*, 106 S. Ct. 2009, 2018 (1986).

The application of these standards in the lower courts has not been a model of consistency. However, our review of the boycott cases convinces us that before we may conclude that refusals to deal are "likely to have predominantly anticompetitive effects," *Northwest Wholesale Stationers*, 472 U.S. at 298, there must be some collusion between competitors on the same market level. Absent this element of horizontal collusion, we do not believe the net economic impact of refusals to deal are "immediately obvious," *Indiana Federation of Dentists*, 106 S.Ct. at 2018, and we therefore believe it inappropriate to classify the refusals to deal that Lomar has alleged as a group boycott subject to a rule of *per se* illegality.[4]

Decisions in other circuits support our conclusion. In *Oreck v. Whirlpool Corp.*, 479 F.2d 126 (2d Cir.) (*en banc*) *cert. denied*, 439

[4] As both *Northwest Wholesale Stationers* and *Indiana Federation of Dentists* should make clear, our conclusion that some horizontal concert of action is necessary in this context does not imply that it is *sufficient* to justify application of the *per se* rule. In both of those cases, the Supreme Court held that concerted refusals to deal by horizontal combinations should be examined under the rule of reason rather than the *per se* rule. *Northwest Wholesale Stationers*, 472 U.S. at 298; *Indiana Federation of Dentists*, 106 S. Ct. at 2018.

U.S. 946 (1978), the Second Circuit refused to apply the *per se* rule to Whirlpool's termination of Oreck as a distributor at the behest of another major distributor, Sears Roebuck. The court distinguished *Klor's*, noting that horizontal and vertical restraints merit different treatment under the antitrust laws. Although the former "have been characterized as 'naked restraints of trade with no purpose except stifling competition,'" 579 F.2d at 131 (quoting *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)), the latter may "promote inter-brand competition by allowing a manufacturer to achieve certain efficiencies in the distribution of its products." 579 F.2d at 131. The court then concluded that Oreck's complaint involved "an alleged agreement between a single manufacturer and a single dealer" and was, "in essence, an exclusive distributorship controversy" to which the group boycott doctrine did not apply. *Id.*

The Ninth Circuit also has held that "some concerted effort at a single market level — a horizontal combination or agreement — is requisite before the type of per se violation commonly termed a 'group boycott' can be found to exist." *Fine v. Barry and Enright Productions*, 731 F.2d 1394, 1398 (9th Cir.) *cert. denied*, 469 U.S. 881 (1984). Fine was a law student and frequent television game show contestant who complained that network rules which limited the appearances of non-celebrities on the shows constituted a group boycott by the shows' producers and the broadcasting networks. Observing that some horizontal concert of action was part of "the fundamental nature of a group boycott," *id.*, the court held that agreements between the networks and producers implementing the rules were vertical, and therefore subject to rule-of-reason analysis, *id.* at 1398-99. A majority of the circuits appear to follow a similar rationale. *See Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1223-24 & n.1 (10th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3259 (Sept. 22, 1986); *Terry's Floor Fashions, Inc. v. Burlington Industries, Inc.*, 763 F.2d 604, 610 n.10 (4th Cir. 1985); *Construction Aggregate Transp., Inc. v. Florida Rock Indus.*, 710 F.2d 752, 776-79 (11th Cir. 1983) (alternative analysis); *Products*

Liability Ins. Agency v. Crum & Forster Ins. Cos., 682 F.2d 660, 663-65 (7th Cir. 1982); *Carlson Machine Tools, Inc.v. American Tool, Inc.*, 678 F.2d 1253, 1259 (5th Cir. 1982). *But see M & H Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 973, 978 (1st Cir. 1984) (citing *Klor's* in noting that horizontal combination "is not an invariable prerequisite to per se treatment of a boycott," but acknowledging the general rule that vertical combinations are subject to rule-of-reason analysis).

Lomar refers us to decisions in which vertically imposed restraints were subjected to *per se* analysis as horizontal restraints. In *Malley-Duff & Associates v. Crown Life Ins. Co.*, 734 F.2d 133 (3d Cir.), *cert. denied*, 469 U.S. 1072 (1984), a terminated insurance agent alleged a group boycott between several competing agents and a major insurance carrier. The Third Circuit, relying on *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979), concluded that although vertically imposed, the termination was horizontally motivated and "its principal impact was felt on the horizontal level." 734 F.2d at 141. The court held that if the termination was "the product of competitors working in concert with themselves or in conjunction with the [insurance] company to exclude a person or group from the market, the necessary elements of a boycott in the classical sense may be present," and would justify application of the *per se* rule. *Id.* at 142.

In *Com-Tel v. DuKane Corp.*, 669 F.2d 404 (6th Cir. 1982), the Sixth Circuit found a *per se* unlawful group boycott in a distributor termination case involving conduct similar to that alleged by Lomar. There, a competing distributor persuaded DuKane, an audio products manufacturer, to cease dealing with Com-Tel and to pressure its other distributors to do the same. The court drew a sharp distinction between vertical refusals to deal imposed at the request of a competing distributor and those imposed unilaterally as part of the manufacturer's own marketing policy. *Id.* at 410-411. While recognizing that the latter generally are governed by the rule

of reason under *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977),the court held that the former cannot be defended on similar interbrand efficiency grounds, and thus they warrant application of the *per se* rule. 669 F.2d at 411-12. The court concluded that where both the source and impact of a refusal to deal are horizontal, the purpose of the restraint must have been solely to restrict intrabrand competition, rather than to elimiate free riders in an effort to stimulate interbrand competition. *Id.* at 412; *compare Davis-Watkins Co. v. Service Merchandise,* 686 F.2d 1190, 1198-1201 (6th Cir. 1982) (rule of reason applied where manufacturer produced evidence of free rider rationale and where there was no evidence that dealer complaints motivated manufacturer refusal), *cert. denied*, 466 U.S. 931 (1984).

We do not believe the reasoning of these cases is applicable here. As a preliminary matter, *Malley-Duff* may be distinguished on its facts because, unlike the present case, it involved an alleged combination on a horizontal level. 734 F.2d at 141. Similarly, *Cernuto* involved allegations of a price-related conspiracy, which the court cited as an independent basis both for applying the *per se* rule and for distinguishing the Second Circuit's holding in *Oreck*. 595 F.2d at 168-70. More significantly, however, we find in Lomar's interpretation of these cases no reasonable means of distinguishing the restraints to be labeled vertical and treated under the rule of reason from those to be designated "vertically-imposed-but-horizontally-motivated" and anlyzed as group boycotts under the *per se* rule.

We agree with the assumption that an anticompetitive impact is likely to result when restraints are imposed with an anticompetitive purpose. However, to apply the *per se* rule to the present case, we would have to assume that the purpose of a vertical restraint reasonably can be inferred from its source. This assumption we are not yet ready to make.

There is academic support for the assumption in *Com-Tel* that dealer-inspired restraints are more likely to involve purely anti-competitive motives. *See, e.g.*, VII Areeda, *Antitrust Law* ¶1453c at 144 and ¶ 1457 at 166-76. However, a firm's hostility toward a competitive rival is not always the proper object of antitrust concern, and may even be indicative of healthy competition. *See Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc.*, 784 F.2d 1325, 1338-39 (7th Cir. 1986). Moreover, we are not prepared to accept the argument that non-price-related vertical refusals to deal, even if inspired by a competing dealer, are so predominantly anticompetitive and involve such remote possibilities of counter-vailing procompetitive effects, that application of the *per se* rule is appropriate. A distributor who requests the imposition of vertical restraints upon (or even termination of) a rival clearly may be acting with anticompetitive animus. However, to impose a *per se* rule on this basis is to focus solely on the distributor's role as an intrabrand competitor, and to ignore his role in interbrand competition.

The distributor may have a better understanding than his supplier of which intrabrand restraints will most significantly enhance the interbrand competitiveness of the supplier's goods at the retail level. Indeed, this expertise may be one of the main reasons for the supplier's decision to employ an independent distributor rather than to integrate vertically his own distribution network. *A fortiori*, the "market strategy" of intrabrand restraints, which the *Com-Tel* court considered dispositive in applying a *per se* or rule-of-reason analysis, 669 F.2d at 411 (quoting *Cernuto*), often will be the product of consultations between the supplier and his distributors. To apply a *per se* rule to the supplier's solicitation of marketing advice from the important source of information in formulating and initially implementing a market strategy. To adopt the reasoning in *Com-Tel* is thus to limit the supplier's market strategy to those intrabrand restraints the supplier choses to implement without the advice of its chosen distribution "expert."

This deprives the supplier of one of the primary efficiencies it seeks in verticallly diversifying its product distribution.

In theory, there may be some validity in drawing a distinction between "dealer-*inspired*" and "dealer-*coerced*" restraints. As discussed above, the former may be fully consistent with a supplier's efforts to develop an efficient marketing strategy, even though the source of the restraints is one of its dealer. On the other hand, where the dealer forces upon an unwilling supplier more restrictive intrabrand restraints than the supplier would have imposed in serving his own interest in efficient distribution, there is a greater likelihood that the dealer is seeking an anticompetitive advantage. *See generally*, VII Areed, *Antitrust Law* ¶1453c at 144-45. In such cases, a presumption of anticompetitive effects (and h nce the application of a *per se* rule) might be justified.

Nevertheless, as an administrative matter this distinction would be very difficult to draw; the trier of fact would need to distinguish between a dealer's strong suggestion and outright demand, and between a supplier's willing acceptance and gruding acquiescence. Lomar's assertion that GF imposed the refusals to deal with Lomar on "somewhat indifferent" suppliers aptly illustrates the nebulous character of this inquiry in practice. Even if GF's motive for requesting that the suppliers refuse to deal with Lomar were clear, the individual motive of each of the suppliers in agreeing to that request is not, and Lomar has offered no evidence of the suppliers' motives.

Lomar argues that there are no sound reasons for supposing that the suppliers here were responding to efficiency-related concerns, or that GF legitimately was concerned about free-riding by Lomar on product promotion and shelf service. Brief of Appellant at 34 & n.9. This argument misses the mark, because it focuses on the justifications for these particular refusals to deal, rather than on any predominantly anticompetitive effects of dealer-inspired re-

fusals as a class. As we have already noted, there are potentially legitimate reasons for a distributor to request that a supplier refuse to deal with another distributor in an effort to develop a more efficient marketing policy for the supplier's goods.[5] Moreover, experience with the actual economic effects of similar restraints in the exclusive distributorship context mitigates against application of the *per se* rule. *See, e.g., JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.*, 519 F. Supp. 1085, 1090-93 (N.D. Cal. 1981), *aff'd*, 698 F.2d 1011 (9th Cir.), *cert. denied*, 464 U.S. 829 (1983).

We believe that absent any collusion at some horizontal level, "[t]he rule of reason provides a more discriminating way of differentiating" the procompetitive refusal to deal from the anticompetitive one. *Oreck*, 579 F.2d at 132 n.6. Because Lomar's complaint alleged no combination between horizontal competitors, the District Court did not err in analogizing the refusals to deal to exclusive distributorships[6] and in awarding summary judgment to defendants on Lomar's claim that defendants violated the *per se* rule by

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[5] Competitive justifications for dealer-inspired restraints may be equally applicable to cases, like the present one, where the dealer allegedly has requested similar restraints from several suppliers. Where the plaintiff alleges a combination between the suppliers, as in *Klors'*, an element of horizontal collusion is present, which more strongly suggests a predominantly anticompetitive intent and impact. In these circumstances, our experience warrants application of the *per se* rule. *Cf. Broadcast Music, Inc.*, 441 U.S. at 9. However, where there is no horizontal combination, separate conspiracies between the dealer and each of the various suppliers should be evaluated individually. While a series of dealer-inspired refusals to deal may signal the dealer's anticompetitive intent, they may be equally indicative of an efficiency-related justification for the requested refusals. The same types of intrabrand restraints, such as limited or exclusive distributorships, may be especially appropriate where, as here, the products and the market in which they are sold are extremely similar. Accordingly, Lomar's argument in favor of the *per se* rule is not bolstered by its allegation that GF requested more than one supplier to refuse to deal with Lomar; each refusal is subject to rule-of-reason analysis.

[6] Lomar argues that Dieter's never intended to create an exclusive distributorship with GF, and that rule-of-reason analysis therefore is inappropriate. Clearly the distinction between restraints subject to *per se* analysis and those analyzed under the rule of reason should not depend upon specific contractual terms granting an exclusive distributorship or franchise, *see Westman Comm'n Co.*, 796 F.2d at 1225, for this is to give economic significance to the mere labels which the parties attach to their agreements. More significantly, Lomar's argument confuses the rationale for applying the rule of reason with the types of restraints to which the rule applies. We apply the rule of reason to exclusive distributorships and vertical refusals to deal because they are not almost always certain to have predominantly anticompetitive effects (and therefore should not be condemned as being *per se* unlawful), not because their impetus and structure are identical.

engaging in a group boycott.

Price Discrimination

Lomar next appeals the District Court's ruling on its price discrimination claim under section 2(a) of the Robinson-Patman Act. Lomar alleges that GF engaged in a pattern of price discimination involving approximately 180 products sold in competition with Lomar in the relevant market. Lomar also challenges GF's creation of a special "price zone" roughly corresponding to the territory in which Lomar and Gf effectively compete, and within which GF allegedly charges lower prices on its entire line of goods. In support of these allegations, after months of discovery, Lomar produced a series of exhibits purporting to demonstrate GF's pricing below average variable cost on four of the 180 items. GF objected to these exhibits on several grounds, arguing that Lomar improperly included legal, adminstrative, warehouse, advertising, and certain insurance costs in computing GF's variable costs. GF also complained that the exhibits improperly compared costs and prices from different years. The District Court, observing that Lomar failed to respond to these objections, ruled that Lomar's exhibits were insufficient to raise a triable issue of fact on GF's alleged pricing below average variable cost. *Lomar II*, 627 F. Supp. at 119-20. Moreover, the court held that Lomar had not presented any other evidence from which GF's predatory intent could be inferred. *Id.* at 20. Because the court previously had held that Lomar failed to demonstrate any anticompetitive impact of the alleged price discrimination through market analysis, *id.* at 118-19, it granted defendant's motion for summary judgment,*id.* at 120.

Lomar launches its assault on the District Court's ruling from several fronts. First, it argues that in a primary line case under the Robinson-Patman Act, a plaintiff need not demonstrate any injury to competition, because liability may be imposed solely upon a showing of harm to an individual competitor. Second, Lomar

argues that in some circumstances predatory intent may be shown by proof of defendant's pricing below average *total* cost rather than average *variable* cost. Finally, Lomar contends that the District Court erroneously held that the legal, administrative, warehouse, and advertising costs were fixed rather than variable. According to Lomar, the determination of whether these costs are fixed or variable is a question of fact for the jury. Because GF's pricing on the four products in the exhibits allegedly was below average variable costs if *all* costs are assumed to be variable, Lomar argues that it was entitled to a trial on its price discrimination claims. We reject each of these arguments.

This Court recently has considered the elements of proof required in a Section 2(a) case, and we directly have addressed the first two of Lomar's arguments regarding its price-discrimination claim. In *Henry v. Chloride, Inc.*, 809 F.2d 1334 (8th Cir. 1987), we examined the legislative history and case law interpreting the Robinson-Patman Act, and concluded that to support a Section 2(a) primary line claim, the plaintiff must "either show substantial possibiliity of injury to *competition* by market analysis, *or* show injury to *a competitor accompanied by predatory intent.*" *Id.* at 1341 (emphasis added). As we observed, [i] njury to a single competitor, even in conjunction with price discrimination, can represent 'honest competition' as much as 'illegal conduct,' or even mismanagement or inefficiency by the injured competitor." *Id.* (citation omitted). Accordingly, when the evidence shows injury only to a competitor (as opposed to competition in general), we require an additional showing of the defendant's predatory intent.[7]

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[7] Lomar makes much of the District Court's observation that "a jury could reasonably find that GF and Art Stone had a goal of eliminating or weakening Lomar as a competitor." *Lomar I*, 627 F. Supp. at 111. We therefore should note at the outset that the predatory intent required under this prong of the *Henry v. Chloride* test is broader than an intent to undermine a particular competitor; it must relate to the market as a whole. As we observed in *Henry*, a showing of GF's predatory intent with regard to Lomar alone "only circles back to the injury-to-a-single competitor standard and is inadequate in light of our decisions." 809 F.2d at 1343 n.8.

When necessary, plaintiffs may demonstrate predatory intent in one of two ways. In some cases, the plaintiff will present direct evidence of the defendant's predatory intent. *Id.* at 1344. More often, the plaintiff will need to demonstrate intent indirectly, through inferences derived either from the defendant's conduct (such as below-cost pricing) or from other "circumstantial factors such as defendant's relative size, entry-barriers, etc." *Id.* In evaluating a defendant's pricing, there are presumptive standards for the inferences to be drawn regarding predatory intent: "prices above average total cost are legal *per se*" under Section 2(a), while average variable cost is a marker of rebuttable presumptions, with the plaintiff holding the burden above and the defendant below." *Id.* at 1346 (footnote omitted). Applying these standards to this case, we agree with the court below that Lomar has failed to establish an issue for the jury on its price-discrimination claim.

A. Market Analysis

Lomar argues that the relevant market consists of only two competitors, Lomar and GF.[8] Based on this argument, Lomar apparently contends that any competitive injury to its own business results in an anticompetitive impact on the market as a whole. The flaw in this reasoning was recognized by the District Court:

> . . . Lomar's assertion that it was injured in its attempt to sell the 180 items is simply a way of saying that it lost business and profits which, in turn, shows that competition was injured. The diversion of business and the corresponding loss of profits is a natural consequence of honest and vigorous competition.

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[8] In light of Lomar's own deposition testimony mentioning at least three other specialty food distributors in the Iowa market, the assertion clearly lacks credibility. IV App. at 56-57. However, the District Court evaluated Lomar's claims in the context of a motion for summary judgment, and therefore was restricted in making such credibility determinations. We are similarly restricted in our review of the evidence, and therefore assume *arguendo* that Lomar and GF are the only significant competitors currently in the market.

Lomar II, 627 F. Supp. at 118. That the antitrust laws are not designed to protect individual competitors from the natural consequences of the competitive process is clear. *See Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 387 n.3 (8th Cir. 1987); *see also D.E. Rogers Associates, Inc. v. Gardner-Denver Co.*, 718 F.2d 1431, 1439 (6th Cir. 1983), *cert. denied*, 467 U.S. 1242 (1984). Moreover, the same axiom applies in markets containing very few or even only two firms. The distinction between injuries to *competitors* and injuries to *competition* is therefore crucial; if we fail to recognize the distinction, then the effect of the antitrust laws in the few- or two-firm market is to prohibit all injuries to competitors, and thus to discourage legitimate competition between the small number of firms comprising the market.

As this Court previously has observed, "analysis of the injury to competition focuses on whether there has been a substantial impairment to the vigor or health of the contest for business, regardless of which competitor wins or loses." *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986). Even in a two-firm market, when one of the competitors is eliminated, other factors in the market may indicate that *competition* is not substantially impaired. For example, if entry barriers to new firms are not significant, the elimination of the competitor may not significantly affect competition as a whole, because a new firm or firms easily can enter the market to take the place of the old one. In such cases, competitive pressure from potential market entrants may still exist, and the departure of the defendant's sole competitor does not necessarily mean that competition is threatened.

In *Henry*, the plaintiff also alleged that the relevant market consisted of only two firms. However, the market in that case involved significant customer loyalty and reliance on the expertise of the existing salesmen, and there was evidence that cross-elasticities of demand for products in related markets was very low. 809 F.2d at 1342. Those factors posed entry barriers to potential

competitors, and to some extent insulated the market from external competitive pressure. As a result, the plaintiff's showing of injury to competition occasioned by the plaintiff's demise (as a result of the price discrimination) was sufficient to withstand a motion by the defendant for judgment n.o.v. *Id.* at 1343.

However, these same considerations make it clear that Lomar has not produced sufficient evidence to support a "market analysis" theory of competitive injury under section 2(a).[9] First, Lomar has attempted to demonstrate below-cost pricing on only four of the 180 items allegedly subject to discriminatory pricing by GF. For the other 176 items, Lomar rests solely on the allegations contained in its pleadings, and on the supposed inferences to be drawn from the evidence on the four items. Through extensive discovery, Lomar had access to pricing and cost information on all 180 items. We do not believe it rational to infer from the evidence submitted on these four items that the pricing of the other 176 was below cost. Hence, if any competitive injury under section 2(a) occurred, it was solely the result of GF's pricing on the four items for which Lomar submitted price/cost comparisons.

More significantly, although Lomar characterized the 180 items as "mainstay products which *together* account for a significant part of any specialty food distributor's sales," I App. at 279-80 (emphasis added), the record shows that Lomar's sales increased by more than 20% in 1982, during the pendency of the alleged price discrimination. I App. at 211. Lomar's president still characterizes

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9 The District Court rejected Lomar's original definition of the product market as consisting solely of specialty foods distribution. In response to a subsequent order from the District Court seeking an acceptable definition, Lomar asserted that no market definition was required, because Lomar had shown injury to itself through below-cost pricing by GF. I App. at 275-79. On appeal, Lomar apparently has recognized the importance of defining the relevant market, and strongly asserts that the appropriate definition is a disputed issue of material fact. Lomar's earlier position arguably could be interpreted as a waiver of a "market analysis" theory of injury, relieving us of the need to address it here. However, because the District Court chose to exmine the market analysis prong in its order, *Lomar II*, 627 F. Supp. at 118-19, we also address it here.

Lomar as the dominant firm in the relevant market, and Lomar admits that within the relevant geographic market, its sales exceed those of GF. *Id.* at 211-12; *see also* IV App. at 12,56. Finally, Lomar has neither alleged nor submitted evidence to support the inference that its difficulty in selling these four items had any measureable impact on its overall viability as a competitor. A plaintiff's increased sales volume does not inevitably preclude recovery in a Section 2(a) case. *See Rose Confections, Inc.*, 816 F.2d at 387 (citing *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 702 (1967). However, where there is no evidence of a "drastically declining price structure," *Utah Pie*, 386 U.S. at 703, or of increasing concentration in the market, *see id.* at 700, an increase in the plaintiff's sales volume is inconsistent with a finding that the defendant's pricing has cause competitive injury, *See Borden Co. v. FTC*, 381 F.2d 175, 179 & n.12 (5th Cir. 1967). This is especially true where the plaintiff claims to be the defendant's sole competitor. Lomar has pointed to no evidence suggesting the erosion of competition. In these circumstances, we agree with the District Court "that, despite ample opportunity, plaintiff has failed to come forward with evidence . . . to support its theory that it can show anticompetitive effect through market analysis." *Lomar II*, 627 F. Supp. at 118-19.

B. Predatory Intent

Assuming *arguendo* that Lomar could demonstrate individual injury resulting from GF's discriminatory pricing, *Henry* requires that we examine whether Lomar also could demonstrate GF's predatory intent. For this purpose, Lomar again relies on its pricing studies of the four items. The District Court found, and we agree, that the price/cost comparisons of the four items are insufficient as a matter of law to raise a genuine issue of material fact on the question of whether GF had predatory intent.

Lomar drew its per-product cost figures for the items from GF's responses to Lomar's interrogatories. One of those responses con-

tained a typing transposition, which GF later corrected. Addendum to Brief of Appellee at 20-21; I App. 310-11. Although Lomar now contends that this transposition raises a genuine dispute of fact, the record amply supports GF's explanation of the error. We agree with the District Court that the transposition did not raise a *genuine* issue of fact as to the pricing of that item.

Lomar's evidence of predatory pricing on the other three items is equally unavailing. As discussed above, we established a rebuttable presumption in *Henry v. Chloride* that a defendant's pricing above average variable costs is not predatory. The distinction between fixed and variable cost is therefore significant in this case, because GF's pricing is above its average variable costs (and hence presumptively not predatory) if, as GF urges, we exclude the legal, administrative, warehouse, advertising, and insurance costs from the calculation of GF's variable cost on the three items. Although we agree with Lomar that the characterization of costs as fixed or variable generally is an issue of fact for the jury's resolution, *see William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1038 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982), we do not believe that Lomar's mere allegation that these costs are part of GF's average variable costs raises a genuine issue of material fact precluding summary judgment. If we were to hold otherwise, a plaintiff could avoid application of *Henry* in the summary judgment context simply by alleging that all of a Section 2(a) defendant's costs were variable. We decline so to undermine the standards announced in *Henry*. Accordingly, Lomar's allegations that GF's adminstrative and other overhead costs are variable are not, without more, sufficient to withstand GF's summary judgment motion. *See Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2553 (1986) (nonmoving party may not rest on mere allegations where it bears the burden of proof on dispositive issue at trial).

Finally, even if Lomar had made some evidentiary showing that each of the costs included in its calculations varied with output, the

evidence of GF's below-cost pricing still would be fatally flawed. The District Court found that Lomar based it calculations on information supplied by GF for 1983 prices. *Lomar II*, 627 F. Supp. at 119. However, the corresponding information regarding costs was drawn from the period between September 1981 and October 1982, during which the price discrimination allegedly occurred. The District court therefore found that Lomar's comparison of GF's 1983 prices to 1982 costs was irrelevant. *Id.* Although Lomar attributes this discrepancy in its price/cost comparisons to "infirmities in the information supplied by [GF]," Brief of Appellant at 48 n.16, we find no such infirmities. The correct pricing information was available in defendant's answers to Lomar's interrogatory 2a. Addendum to Brief of Appellees at 19. Even accepting Lomar's calculations of GF's variable costs, an examination of those answers reveals that none of the three remaining items was priced below average variable cost. Accordingly, we hold that Lomar has failed to raise a genuine issue of GF's predatory intent through evidence of below-cost pricing on any of the items mentioned in its complaint.

Because we observed in *Henry* that a plaintiff seeking damages under Section 2(a) also can demonstrate predatory intent through circumstantial factors unrelated to pricing, 809 F.2d at 1344, we must discuss briefly the evidence Lomar submits on non-price factors in the market from which we might infer GF's predatory intent.[10] Applying *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), to the Section 2(a) claim in *Henry*, we held that the Robinson-Patman defendant "must be able to create a real possibility of both driving out a rival by loss-creating

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[10] Lomar's briefs contain numerous factual allegations regarding such factors and the composition of the relevant market, but few of the allegations are supported by specific citation to the extensive record. Apparently, Lomar has left it to the Court to sift through the record in search of the particular pleadings, depositions, answers to interrogatores, admissions, and affidavits which might raise a triable issue of fact on predatory intent. Although we have undertaken this review, we generally have been forced to speculate about which documents in the record Lomar believes support both its factual allegations and the inferences regarding GF's predatory intent that are to be drawn therefrom.

price cutting and then holding on to that advantage to recoup losses; in other words, the price-cutter must be able at least to threaten domination of the market." *Henry v. Chloride*, 809 F.2d at 1345. Therefore, "[a] ccepting rational economic conduct as the standard for predation," we assume that predatory conduct will be undertaken only when success is plausible. *Id.*

Under this standard, the "circumstantial factors" adduced in Lomar's allegations and supporting documents do not raise a material issue of GF's predatory intent. An affidavit from Lomar's president states that entry barriers — approximately $1.5 million in required capital and employees with significant expertise in the wholesale grocery business — would make it difficult for potential competitors to replace Lomar in the event of its demise. I App. at 257-58. Moreover, Lomar notes that because there are allegedly only two firms in the market, the presence of these entry barriers would guarantee GF a monopoly position from which to recoup profits lost in a predatory pricing scheme. We disagree.

Lomar's argument ignores the peripheral competitors which Lomar concedes are already of at least some significance in the existing market. *See* IV App. at 11-12, 36-37, 52-56. Although Lomar asserts that at present there is very little competitive influence from these other specialty food distributors (who serve primarily other geographic areas) and from general grocery wholesalers (who have a more limited specialty foods inventory), these firms nevertheless are perfectly poised to expand their competitive presence in the market if Lomar's elimination were to generate monopoly profits for GF. Each of the firms already employs individuals with significant expertise in the wholesale grocery business, and already has made much of the required capital investment in inventory and distribution facilities. As soon as GF began to raise prices above competitive levels (in the effort to recoup losses incurred in eliminating Lomar) these other firms would have little

difficulty in detecting[11] and responding to the competitive opportunity created. These circumstances strongly suggest that predatory pricing by GF would not be rational economic behavior.

Lomar has not pointed us to any other "circumstantial" market factors from which a jury reasonably could infer that GF acted with the requisite predatory intent, nor have we discovered any in our own review of the record. Because we previously have found that Lomar failed to raise a triable issue of GF's predatory intent by any of the other methods set forth in *Henry v. Chloride*, we hold that the District Court did not err in granting summary judgment to defendants on Lomar's price-discrimination claim.

Illegal Brokerage

Lomar's final claim against GF charges defendant with receiving illegal brokerage in violation of Robinson-Patman Section 2(c). 15 U.S.C. §13(c). Lomar charges that GF received illegal brokerage payments through two dummy corporations established for the primary purpose of collecting the payments from grocery suppliers. Lomar's sole specific allegation of injury from the alleged brokerage arrangement was based on the typing transposition contained in GF's pricing information on one of its products. *Lomar II*, 627 F. Supp. at 119-20. Based on this erroneous information, Lomar contended that GF had engaged in price discrimination on at least one item for which illegal brokerage payments allegedly were received, and that the brokerage payments were used to finance the price-discrimination scheme aimed at Lomar. The District Court rejected this contention, finding that GF's historical pricing information did not support Lomar's allegation of injury from the brokerage payments. Finding no other evidence of injury from the

[11] The evidence shows that the distributors and wholesalers carefully monitor their competitors' prices. II App. at 5; III App. at 141; IV App. at 37-38. The firms often provide price catalogues to their customers, and that the catalogues issued by competitors are an important source of information in an industry in which prices, market share, and competitors frequently change. I App. at 215; II App. at 113, 242; IV App. at 11.

alleged brokerage payments, the District Court granted GF's motion for summary judgment on the Section 2(c) claim. On appeal, Lomar argues that it need not demonstrate specific injury to recover for GF's violation of Section 2(c). Alternatively, Lomar argues that the injury from the brokerage payments lies in the extent to which the payments helped finance GF's price discrimination.

We agree with the District Court that Lomar has not demonstrated any injury from the brokerage payments, and that this failure is fatal to Lomar's standing to bring the Section 2(c) claim. Section 4 of the Clayton Act clearly requires antitrust plaintiffs to demonstrate an injury to their business or property as a prerequisite to a private action under the antitrust laws. 15 U.S.C. § 15 (a). Absent this showing, a private suit based on alleged violation of Section 2(c) must fail. Lomar's citations to Federal Trade Commission enforcement actions are clearly inapposite; no injury to a competitor is rquired in such actions. *See FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65 (1959).

Lomar alleges that the dummy corporations were used to finance GF's price discrimination and that Lomar's injury can therefore be measured by the amount of the brokerage. However, as we already have observed, Lomar has not raised a triable issue of fact on GF's discriminatory pricing with respect to any of the items mentioned in the complaint. Accordingly, Lomar cannot point to injury allegedly sustained as a result of GF's price discrimination to bootstrap its standing to bring an action for illegal brokerage.

Absent some showing of specific injury as a result of the alleged brokerage payments, Lomar is not in a position to pursue its Section 2(c) claim; it cannot rely on an inference of injury derived from the mere allegation of a Section 2(c) violation. *See generally Haff v. Jewelmont Corp.*, 594 F. Supp. 1468, 1471-76 (N.D. Cal.

1984) (nature of causal connection required between plaintiff's injury and defendant's conduct); *cf. J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 561-63 (1981) (no automatic damages for Section 2(a) violation). Because Lomar pointed to no evidence from which a showing of injury to itself could be made, the District Court did not err when it granted GF's summary judgment motion on Lomar's Section 2(c) claim.

The orders of the District Court entering summary judgment against Lomar with repect to each of its claims are in all respects affirmed.

AFFIRMED.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

LOMAR WHOLESALE GROCERY, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL NO. 79-401-E
	)	
DIETER'S GOURMET FOODS, INC., GOURMET FOODS, INC. and ART STONE,	)	ORDER
	)	
	)	
Defendants.	)	

This Order addresses the three motions for summary judgment filed by defendants which relate to plaintiff's Sherman Act claims. First is the Motion for Summary Judgment of Defendants Gourmet Foods, Inc., and Art Stone as to Plaintiff's Sherman Act Claim in Respect to Dieter's Gourmet Foods, Inc., Products which was filed on February 15, 1983 (Docket No. 159). Second is the same defendants' motion for summary judgment as to plaintiff's Sherman Act claim in respect to Celestial Seasoning, Inc., products which was filed on July 21, 1983 (Docket No. 191). Third, on July 27, 1983, the same defendants filed a motion for summary judgment as to plaintiff's Sherman Act claims regarding Chicago Dietetic Supply, Inc. products (Docket No. 196). Plaintiff filed two memorandum which set forth its position; one was filed on July 7, 1983 (Docket No. 186), and the other was filed on March 30, 1984 (Docket No. 208). Oral arguments were presented to the Court on November 9,. 1984 in Des Moines, Iowa. Thereafter, the parties filed a Stipulation which significantly narrowed the issues involved in the motions for summary judgment (one copy of the Stipulation was filed on

February 4, 1985, Docket No. 241; a second copy was filed on February 6, 1985, Docket No. 242). For the reasons stated below, defendants' motions for summary judgment as to the Sherman Act claims shall be granted.

I. Chicago Dietetic Products.

Defendants moved for summary judgment contending that the four-year statute of limitations set forth in 15 U.S.C. §15(b) which applies to antitrust claims expired before plaintiff filed its claim regarding Chicago Dietetic products. On August 26, 1981, the plaintiff filed an amended complaint which alleged a combination or conspiracy between the defendants and Chicago Dietetic Supply, Inc., to restrain trade in violation of Section 1 of the Sherman Act. Specifically, the conspiracy claim relates to Chicago Dietetic Supply's refusal to sell its Featherweight line of products to the plaintiff and for terminating plaintiff as a distributor on March 5, 1976.

Defendants contend that the last overt act of the alleged conspiracy occurred over four years before plaintiff filed its amended complaint and that this amendment should not relate back to the original complaint. Plaintiff argues that the amendment should relate back to the filing of the first complaint or, in the alternative, the attempts by the food brokers, Mr. Robert Mitchell and Mr. Mancel Jones, to obtain Chicago Dietetic products for Lomar resulted in continuing conspiratorial acts which occurred during the limitations period.

A. Relation Back—Rule 15(c).

Fed.R.Civ.P. 15(c) provides:

> **Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

This rule of relation back is consistent with the idea of notice pleading which underlies the Federal Rules.

> [W]hile it is still the rule that an amendment which states entirely new claim for relief based on different

> facts will not relate back, if the pleading sufficiently indicates the transaction or occurrence on which the claim or defense is based, amendments correcting specific factual details, such as time and place, as well as other items, will relate back.

3 *Moore's Federal Practice* ¶15.15(3), at 15-196-98. The first step is to examine what was set forth in the original complaint. Paragraph 12 of the original complaint alleges that

> defendants and certain co-conspirators unknown to plaintiffs have conspired and agreed with one another to boycott and eliminate plaintiff as a competitor in the sale of Dieter's Gourmet salad dressing.

Plaintiff's original allegations consistently charge antitrust violations with respect to only one brand of salad dressing, viz., Dieter's Gourmet. Since the original complaint sets forth only conduct which relates to Dieter's Gourmet salad dressing, the Court finds that the claim regarding Chicago Dietetic's Featherweight product line does not arise out of the conduct or transactions set forth in the original complaint. The allegations in the complaint give defendant no notice of conduct relating to the alleged conspiracy regarding Chicago Dietetic's Featherweight product line.

Next, the Court must consider whether the claim regarding the Featherweight product line arose from conduct which was "attempted to be set forth" in the original complaint. Because plaintiff specifically *intended not to include* its claims regarding Chicago Dietetic products in its original complaint, this Court holds plaintiff is not entitled to relation back on the ground that the claim was "attempted to be set forth" in its original complaint.

The November 4, 1981 deposition of Lou Hurwitz, president and owner of Lomar, indicates that plaintiff intentionally limited its original complaint to claims involving Dieter's Gourmet products. Furthermore, at the time it filed its original complaint, plaintiff was well aware of its potential claim regarding Chicago Dietetic's products. In its Answers to Second Set of Interrogatories to Plaintiff which was filed July 2, 1981, plaintiff states:

> In 1977 or 1978, the exact time being unknown to Plaintiff, Jim Schacherer of Lomar made complaint to

> the Iowa Attorney General's Office that Chicago Dietetic was refusing to sell its Featherweight line to Lomar. Plaintiff understands that an agent of the Attorney General's Office, unknown to Lomar, visited Chicago Dietetic in Chicago and that no one in Chicago Dietetic would talk to him. Plaintiff has no records with reference to this matter and it was not pursued further because thereafter Chicago Dietetic started furnishing its product to Lomar.

Yet, a month and a half later, plaintiff filed an amended complaint asserting the claim. Plaintiff admits that it did not intend to raise any claim about its termination by Chicago Dietetic in its original complaint, but argues that defendants followed a course of conduct that was a broad-based conspiracy and that the broad-based conspiracy included both Dieter's Gourmet and Chicago Dietetic products. However, plaintiff did not allege a broad-based conspiracy in its original complaint. Instead, the conspiracy or conduct alleged specifically mentions only Dieter's Gourmet salad dressing. Therefore, the Court finds that the claim about Chicago Dietetic products did not arise from conduct that was attempted to be set forth in the original complaint.

The Court holds that plaintiff's claim regarding Chicago Dietetic products is an entirely new claim and that defendants did not receive fair notice of it in the original complaint. Thus, the amendment will not relate back under the provisions of Rule 15(c).

B. Continuing Conspiracy.

Lomar argues that continuing antitrust violations occurred when it sought Chicago Dietetic products through food brokers of Remco Ltd. Defendants argue that Lomar did not ask for the Chicago Dietetic products from Chicago Dietetic during the period from March 5, 1976 to January 1, 1980 and that the broker's comments to Frank Rielly are not the acts of Lomar, but are the acts of Remco Ltd., an agent of Chicago Dietetic. In *Zenith Radio Corp. v. Hazeltine Research,* 401 U.S. 321, 338 (1971), the United States Supreme Court stated:

> Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that

> injures a plaintiff's business ... In the context of a continuing conspiracy to violate the antitrust law, such as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.

The Eighth Circuit followed this rule in *Pioneer Co. v. Talon, Inc.*, 462 F.2d 1106 (8th Cir. 1972), when the court held that the statute of limitations began to run on September 4, 1964, the date that two orders Pioneer had placed with Talon were refused and, as a result, Pioneer was caused injury.

It is undisputed that Lomar placed no orders after March 5, 1976. The inquiries by the brokers, even as such inquiries were attributable to Lomar, are not equivalent to placing orders. Rather, this case is analogous to the facts in *Garelick v. Goerlich's, Inc.*, 332 F.2d 854 (6th Cir. 1963). Here, as in the *Garelick* case, the conduct between the brokers and Lomar and the brokers and Chicago Dietetic was such that it did not give rise to any injury or damage to Lomar. When the inquiries made and the action taken in response are general in nature, no new injury is caused. Instead, the injury, if any, experienced by Lomar is part of the continuing injury that was caused by its termination as a distributor. In contrast, where an alleged conspirator fails to fill a specific order, as in *Pioneer Co.*, a specific and identifiable harm is caused to plaintiff by the failure to receive the ordered good. Accordingly the Court holds that the actions taken with reference to the inquiries of the brokers were not overt acts which caused injury or damage to the plaintiff. Thus, the four-year statute of limitations expired before plaintiff's amended complaint was filed and defendants are entitle to summary judgment as to the Sherman Act claim relating to Chicago Dietetic products.

II.

Dieter's Gourmet. Between about January 1, 1975 and January 1, 1981, Gourmet Foods, Inc. (GF), a Minnesota corporation

engaged in the specialty food distribution business, purchased Dieter's Gourmet brand products from Dieter's Gourmet Foods, Inc. (Dieter's), a California corporation located in Los Angeles. GF resold these products in several midwestern states from its warehouse and office located in St. Paul, Minnesota.

Lomar Foods, Inc. (Lomar), is a specialty food distributor covering the upper midwest from its Des Moines, Iowa location. Lomar attempted to purchase Dieter's products directly from Dieter's, but Dieter's declined to sell to Lomar in 1975. From September 17, 1975 to September 15, 1976, Lomar bought Dieter's products from M & JR Hakes, Inc., a grocery warehouse in Laurens, Iowa that obtained these products from Defendant GF. When GF discovered that M & JR Hakes was reselling Dieter's products to Lomar, it refused to sell Dieter's products to M & JR Hakes. This refusal occurred in August of 1976.

Lomar next obtained Dieter's products from Super Service Foods Distributors, Inc., a food distributor in Kansas City, Missouri, for the period from October 12, 1976 until February 8, 1979. Super Service never refused to sell Dieter's products to Lomar and supplied to Lomar all such products that it could. In March of 1979, Super Service was sold to Carlstrom Foods, Inc., a specialty food distributor in St. Louis, Missouri. After this sale, Lomar did not make any purchases from either Super Service or Carlstrom Foods, Lomar agrees that the refusal, if any, of Carlstrom Foods, Inc. to sell Dieter's products to Lomar in April, 1979 was unilaterally determined, self-motivated behavior.

In August or September of 1978, Lomar again tried to purchase Dieter's products directly from Dieter's. Lomar attempted to get Dieter's to undertake a survey of its Iowa distribution. In early 1979, Lomar submitted an order together with a credit application to Dieter's. In a letter dated March 30, 1979, Dieter's informed Lou Hurwitz of Lomar that Dieter's would hold Lomar's order for six months and would conduct a market survey. Lomar filed this lawsuit on August 30, 1979, before the six months had expired.

Celestial Seasoning. Celestial Seasoning, Inc. (Celestial), is a

Colorado corporation located in Boulder, Colorado which manufactures and sells a line of teas, including herbal teas. Celestial has sold its products to Lomar, GF, and other distributors. At no time has GF held an exclusive distributorship for Celestial products. Lomar purchased Celestial products directly from Celestial for a period of time up to July, 1981. Celestial did not sell to Lomar after June, 1981 and in September, 1981, terminated Lomar as a distributor. Sometime in September, 1981, Lomar was able to purchase Celestial products through another distributor, with the permission of Celestial.

Ken Vickerstaff, Celestial's west central regional sales manager, came to Des Moines on June 30, 1981 to survey supermarkets carrying Celestial products. Vickerstaff, after making this survey, felt that Dave's Marketing, Celestial's broker, and Lomar, Celestial's distributor, were not satisfactorily complying with Celestial's shelf-management program. On July 1, 1981, Vickerstaff and Bob Colin of Dave's Marketing met with Lou Hurwitz, Lomar's president, at Lomar's offices. During this meeting a dispute arose relating to Lomar's failure to sell certain iced tea shippers which Celestial had sent to Lomar and relating to a discount which Lomar sought to claim with respect to certain products purchased from Celestial.

After this meeting, Vickerstaff, while at the Des Moines airport, telephoned Paul Enright, Celestial's vice president of sales. While on his way to the airport, Vickerstaff had decided that he would recommend the termination of Lomar as a Celestial distributor. Vickerstaff told Enright that neither the broker nor the distributor was doing its job properly and that he was going to investigate other ways to handle the Iowa market.

After this conversation, Vickerstaff flew to Minneapolis for a meeting with Geoffrey Michael of Sales and Marketing, Inc., Celestial's broker in the Minnesota area, and Art Stone, president of GF. This visit had been planned by Vickerstaff before he went to Des Moines from Boulder. Vickerstaff met with Art Stone and Geoffrey Michael on July 1, 1981 in Minneapolis and initiated a

discussion of the Iowa market and GF's representation in that market.

The decision to terminate Lomar was made by Celestial's management, specifically Paul Enright, after Vickerstaff met with Art Stone and Geoffrey Michael concerning their distribution of Celestial products in the Iowa market. GF and Art Stone were aware of Lomar's termination as a distributor of Celestial products about two months before Lomar had confirmation from Paul Enright of its termination.

Lomar contends that Celestial's termination of it as a distributor was pursuant to a combination, conspiracy and agreement between Celestial and GF and Art Stone and may have been price related. Plaintiff's Response to Statement of Material Facts filed November 20, 1984 (Docket No. 237), p. 5. Lomar also contends that Chicago Dietetic and Dieter's were parties to the conspiracy between Celestial-GF-Art Stone through the operations and conduct of GF and Art Stone. Id., at 5-6.

Claims. Lomar alleges that defendants conspired and agreed regarding three types of restraints; specifically, Lomar asserts that it will prove a group boycott, price fixing, and a horizontal territorial arrangement. Memorandum of Authorities in Support of Plaintiff's Resistance filed July 7, 1983 (Docket No. 186), p. 11. As a result of the stipulation, plaintiff has agreed that it will attempt to prove violations of the Sherman Act solely on per se theories. Whether the per se rule or the rule of reason applies to a particular restraint is a question of law for the courts. Accordingly, the critical issue is whether the alleged restraints should be subject to the per se rule or the rule of reason. If the per se rule applies and there are material factual disputes, defendants' motion for summary judgment must be denied.

When deciding whether to apply the per se rule, the first step is to decide if the business practice falls within one of the categories of restraints which has been declared per se unreasonable. Failing this, the second step is to determine if the per se rule should be

extended to cover the challenged business practice.

A. Group Boycott.[1]

Lomar argues that there exists a classic boycott aimed at disrupting important and necessary trade relations of Lomar with suppliers like Hakes, Dieter's and Chicago Dietetic.

> In this case Lomar has alleged, and will prove a conspiracy to boycott Lomar from participation in the market for specialty goods in Iowa. Gourmet Foods targeted Lomar with extinction and collaborated with manufacturers and suppliers of necessary products to exclude Lomar from competition in the market. Where the effect or object of the conspiracy is to exclude or destroy competition by a competitor of even one conspirator, then the activity should be characterized as a group boycott and treated in law as a per se violation.

Memorandum of Authorities in Support of Plaintiff's Resistance filed July 7, 1983 (Docket No. 186), pp. 14-15.

In analyzing a concerted refusal to deal, the Court must consider the relationship between the parties and the role each party plays in effectuating the refusal to deal. First, the Court turns to defining the parameters of the alleged conspiracy, specifically, who is involved and how they are connected with one another.

Lomar is not contending that Chicago Dietetic combined or conspired with Dieter's. Lomar is not contending that Chicago Dietetic combined or conspired with Celestial. Plaintiff's Revised Answers to Defendants' Fourth Set of Written Interrogatories filed May 18, 1983 (Docket No 172), p. 15. Yet Lomar contends that Chicago Dietetic was a party to the conspiracy between Celestial-GF-Art Stone through the operation and conduct of GF and Art Stone. This leaves open the possibility that horizontal interaction occurred between Dieter's, the diet salad dressing maker, and Celestial, the tea manufacturer. However, no evidence shows nor can it be reasonably inferred that Dieter's and Celestial came to an

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[1]Plaintiff apparently has addressed only the first step, arguing simply that the restraints are tantamount to a boycott and thus illegal per se.

understanding directly with one another.* Also, the evidence does not show that GF and Art Stone gained Celestial's compliance in the alleged conspiracy in mid-1981 as a result of the representation that Dieter's agreed to refuse to deal with Lomar.* Indeed, the Dieter's-GF arrangement occurred so far before Celestial terminated Lomar that the events are related because of GF's involvement in each. Instead, Lomar is contending, in effect, and a jury could reasonably find that GF and Art Stone had a goal of eliminating or weakening Lomar as a competitor in the business of specialty food distribution and that GF and Art Stone agreed separately with each of the three manufacturers without direct contact between the manufacturers that the manufacturers would not deal with Lomar. This broad-based conspiracy could be visualized as a rimless, spoked wheel with GF and Art Stone as the hub and each of the three manufacturers as a spoke.

Next, the Court considers the substance of the agreement or conspiracy which existed between GF and Art Stone and each of the manufacturers. Lomar contends that GF and Art Stone prevailed upon Dieter's, Celestial and Chicago Dietetic and persuaded them to refuse to sell their products to Lomar. Specifically, with respect to the two remaining product line claims, Lomar is contending that Dieter's refused to enter a distributorship arrangement with it because of a conspiracy between Dieter's and GF and is contending that Celestial terminated Lomar as a distributor as a result of GF's intervention. In addition, with respect to Dieter's products, GF stopped selling to M & JR Hakes because it was reselling the product to Lomar. Lomar contends that this activity amounts to a boycott with the purpose of preventing Lomar from having access to certain goods.

First, the terms "group boycott" and "classic group boycott" are labels which are not particularly helpful in thinking about the instant problem. *See Worthen Bank & Trust Co. v. National*

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*Lomar does not explicitly contend that this occurred. Indeed, plaintiff's explanation of the conspiracy has been conclusory and lacking in specifics. Nevertheless, the Court feels obligated, given the standards applicable to summary judgments, to address these possibilities.

Bankamericard, Inc., 485 F.2d 119, 124-25 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974) (reversed district court ruling that a bylaw was a per se illegal restraint). Second, where agreements or arrangements fall under the broad heading of concerted refusals to deal, the real question is whether such a refusal, when the facts are viewed in the light most favorable to the plaintiff, is of a time which has been declared illegal per se. Not all concerted refusals to deal are deemed illegal per se. *Cascade Cabinet Co. v. Western Cabinet & Millwork*, 710 F.2d 1366, 1371 (9th Cir. 1983). *E.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 53 U.S.L.W. 4733 (June 11, 1985). The Third and Fifth Circuits have identified three categories of concerted refusals to deal which are illegal per se:

> (1) horizontal combinations of traders at one level of distribution having the purpose of excluding direct competitors from the market, *e.g., Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 34 S.Ct. 951, 58 L.Ed. 1490 (1914); (2) vertical combinations, designed to exclude from the market direct competitors of some members of the combination, *e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959); and (3) coercive combinations aimed at influencing the trade practices of boycott victims. *E.g., Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951); *Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941).

Consolidated Express, Inc. v. New York Shipping Ass'n, Inc., 602 F.2d 494, 522 (3d Cir. 1979. *See E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee*, 467 F.2d 178, 186-87 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973). The Eighth Circuit has referred to these categories with approval in *Worthen Bank & Trust Co.*, 485 F.2d at 124-25. Accordingly, this Court adopts these categories and turns to whether the instant refusals to deal fall within one such category.

The first category does not apply because there is not a horizon-

tal combination at the level of the direct competitor sought to be excluded, i.e., Lomar. Only GF is a direct competitor of Lomar and it is not dealing with other direct competitors of Lomar.

The Court concludes that the second category is not applicable to the refusals to deal. *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), is distinguishable. Klor's operated a retail store in competition with one of Broadway-Hale's department stores. Klor's complaint alleged that ten national appliance manufacturers and the distributors for these manufacturers had conspired among themselves and with Broadway-Hale not to sell to Klor's. The Supreme Court held that the allegations, if true, showed a boycott that was "not to be tolerated." *Id.*, at 213. In *Klor's*, there was an obvious horizontal character to the conspiracy in that it was among ten national manufacturers. In the present case, the combinations are only vertical in character. In *Klor's*, the Supreme Court distinguished the boycott from the case of manufacturer and a dealer entering an exclusive distributorship. *Id.*, at 212. The facts of the instant case fall between the boycott condemned in *Klor's* and a typical exclusive distributorship. This Court concludes that the present refusals to deal are closer to the exclusive distributorship situation because of their vertical nature and lack of a horizontal connection between competitors on the same level. Consequently, this Court concludes that vertical agreements arrived at independently but part of a broad-based "hub-and-spoke" conspiracy do not fit within the second category of concerted refusals to deal which have been declared illegal per se.

The instant refusals to deal with Lomar do not fall within the third category because those refusals are not aimed at *influencing* Lomar's trade practices. The third category applies to refusals designed to influence a competitor's practices rather than refusals aimed at *eliminating* the competitor. *See E. A. McQuade Tours*, 467 F.2d at 187.

Having concluded that the instant refusals to deal do not fall within any of the three established categories which are deemed illegal per se, the Court turns to whether the per se rule should be

extended to cover these situations. The legal test applied when deciding whether to extend the per se rule to conduct which does not fit easily within the limits of the above categories is

> "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-20, 99 S.Ct. 1551, 1562, 60 L.Ed.2d 1 (1980).

Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1356 (9th Cir. 1982) (per se rule held inapplicable). In other words, a particular restraint must have "a pernicious effect on competition and lack[] any redeeming virtue." *Northern Pacific Railway v. United States*, 356 U.S. 1, 5 (1958). Lomar argues that the refusals to deal have effectively excluded Lomar from competing with GF with reference to the Dieter's products and Celestial products. GF contends that its relationship with Dieter's is properly characterized as an exclusive distributorship which promoted interbrand competition. Similarly, GF contends that its vertical arrangement with Celestial promotes interbrand competition and that Celestial has independent reasons for terminating Lomar as a distributor. Lomar has not specifically addressed the effect these refusals to deal have on interbrand competition. Instead, Lomar argues that the refusals are boycotts, that boycotts are illegal per se, and that, therefore, these refusals are illegal per se. As noted in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), "[i]nterbrand competition is competition among manufacturers of the same general product . . . and is the primary concern of antitrust law." 433 U.S. at 51 n.19.

Plaintiff's answer to Interrogatory No. 19 of the second set of interrogatories of defendants lists nine makers of diet salad dressing, including Dieter's Gourmet and Featherweight by Chicago Dietetic. The answer also states that there "are probably many, many more." With respect to Celestial's product line, other companies have actively entered the herbal tea market although Lomar

contends that these other companies did not offer as wide a selection of flavors nor did they package and promote their products as effectively as Celestial. Because these vertical arrangements which GF has with Dieter's and Celestial are likely to promote interbrand competition—vertical nonprice restraints have long been recognized as a means to promote interbrand competition—this Court cannot conclude that those relationships are plainly anticompetitive and tend to restrict competition. In addition: (1) Lomar is able to get Celestial products from another distributor, albeit not directly from Celestial. (2) the mere fact that a manufacturer such as Celestial or Dieter's changes distributors or refuses to deal with a potential distributor at the request of another distributor does not warrant application of the per se rule. *See Burdett Sound, Inc. v. Altec Corp.*, 515 F.2d 1245, 1249 (5th Cir. 1975) (no antitrust violation to contract with a new distributor and terminate former distributor); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742 (7th Cir. 1982) (two distributors, acting independently, can request a manufacturer to terminate a third distributor who is price cutting). (3) The case of *Com-Tel, Inc. v. DuKane Corp.*, 669 F.2d 404 (9th Cir. 1982), is distinguishable because in that case interbrand competition was not served by defendant's conduct; the sole effect was to reduce intrabrand competition. Id., at 412. (4) As a practical matter, GF's ability to veto the request of others to distribute Dieter's products is so much like a de facto exclusive distributorship, a type of vertical refusal to deal, that this veto power is not properly labeled as a per se unlawful boycott.

In summary, the Court holds that a distributor may enter vertical arrangements with two or three manufacturers where the purpose of each arrangement is to exclude the same competitor of the distributor from marketing that manufacturer's product and where the motivation on the part of the distributor is to lessen the competition with which he is faced. Doing so is not a per se violation of section 1 of the Sherman Act. Rather, these arrangements are subject to scrutiny under the rule of reason. In short, these re-

straints are vertical nonprice restraints. Thus, defendants are entitled to summary judgment on plaintiff's claim regarding a concerted refusal to deal for the purpose of excluding plaintiff.

B. Vertical Price Fixing

It is unlawful per se for a manufacturer to terminate a distributor at the request of a competing distributor when both desire to reduce price competition at the distributor level. *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3rd Cir. 1979). In *Monsanto Co. v. Spray Rite Service Corp.*, 52 U.S.L.W. 4341 (March 20, 1984), the Supreme Court emphasized the importance of distinguishing between distributor termination cases that involve concerted action to set price and those that involve concerted action on nonprice restrictions. Id., at 4343. The former are illegal per se while the latter are judged under the rule of reason.

As to this theory, defendants contend that the plaintiff does not have sufficient proof to reach a jury on the question of concerted action to fix price. Prior to the Supreme Court's decision in *Monsanto Co.* the parties strongly disagreed on the standard of proof required. In *Monsanto Co., t*he Supreme Court settled this legal dispute by holding:

> Thus, something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to the common scheme designed to achieve an unlawful objective." *Edward J. Sweeney & Sons, v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), cert. denied, 451 U.S. 911 (1981)]; *accord H.L. Moore Drug Exchange, v. Eli Lily & Co.*, 662 F.2d 935, 941 (CA 2 1981) *cert. denied,* 459 U.S. 880 (1982); *cf. American Tobacco Co. v. United States,* 328 U.S. 781, 810 (1946) (circumstances must reveal a "unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement").

Id., at 4344 (footnotes omitted). Prior to this ruling it appears that

plaintiff would have survived this motion for summary judgment had this Court chosen to follow *Battle v. Lubrizol Corp.*, 673 F.2d 984, 991 (8th Cir. 1982), *aff'd by an equally divided court,* 712 F.2d 1238 (8th Cir. 1983) (en banc), regarding the proof sufficient to allow the inference of concerted action to fix price. At this point is is important to note that section 1 is not violated if GF and Art Stone, as a single business entity, procured the vertical restraints with the intent to raise price after Lomar was subject to these restraints. The unilateral desire of one party to the restraint to raise prices does not violate section 1. Instead, both the manufacturer and distributor must enter the common scheme with the design to stabilize or fix prices.

Plaintiff's Memorandum filed March 30, 1984 (Docket No. 208), after the *Monsanto Co.* decision, argues that there are questions of fact surrounding defendants' assertions (1) that GF had an "exclusive distributorship" with Dieter's; (2) that Dieter's had independent justification for refusing to grant a distributorship arrangement to Lomar; and (3) that Dieter's was conducting a bona fide market study when Lomar filed this lawsuit.

Plaintiff's argument misses the mark. The thrust of defendant's motion with reference to the vertical price-fixing claim is that plaintiff cannot show GF and Dieter's took concerted action with the *common purpose to fix prices.*

The Court can find that GF had the power to veto applications by other distributors to obtain a distributorship in its territory, can find that the market study was a pretext designed to camouflage the decision which had already been made by GF and Dieter's to refuse to deal with Lomar, can find that GF was a powerful force in the market, can find that GF did not have an "exclusive distributorship" with Dieter's, and can find that GF raised its prices after Lomar was unable to buy Dieter's products. Yet none of these facts give rise to the inference that there was a price-fixing conspiracy between GF and Dieter's.

The Supreme Court in *Monsanto Co.* specifically held that an agreement could not be inferred merely from complaints by dis-

tributors to the manufacturer about price-cutting distributors and the fact that termination came about in response to such complaints.[3] In *Roesch, Inc. v. Star Cooler Corp.*, 671 F.2d 1168, 1172 (8th Cir. 1982), *aff'd by an equally divided court*, 712 F.2d 1235 (8th Cir. 1983) (en banc), the panel indicated that a manufacturer's recommendation to its distributors to charge a certain price did not permit the inference of illegal activity unless there is additional evidence of price monitoring or evidence of pressure and coercion to secure adherence to the suggested price. None of these factors are present in the instant case. Under the standards set forth in *Monsanto Co. v. Spray Rite Services,* the Court concludes that Lomar has not produced enough proof to permit the inference of a price-fixing conspiracy between Dieter's and GF. Thus, defendants are entitled to summary judgment on plaintiff's section 1 claim relating to Dieter's products.

Interrogatory No. 63 of Defendants' Amended and Substituted Third Set of Written Interrogatories to Plaintiff request Lomar to state the specific conduct, acts or practices of GF, Art Stone and Celestial that it contends constitute an attempt to fix the price of Celestial products. Lomar's answer states:

> Giving instruction to Gourmet Foods, Inc., sales personnel to stop selling Celestial Seasoning, Inc. products in Iowa.
> Attempting to get an exclusive distributorship for Celestial Seasoning, Inc. products in Iowa.
> Instructing its salesmen to offer Celestial Seasoning, Inc. products for sale to customers in Iowa on a one-for-one basis; customers were told that if they bought one case of Celestial Seasoning, Inc. products that they would get one free.
> Securing the brokerage of Celestial Seasoning, Inc. products through Sales and Marketing.
> The termination of plaintiff as a distributor of Celestial Seasoning, Inc., products by Celestial Seasoning, Inc.
> The termination of Davis Brokerage by Celestial Seasoning, Inc. as a broker for Celestial Seasoning , Inc. products.
> Awarding the brokerage of Celestial Seasoning, Inc. to

Sales and Marketing, Inc.

Interrogatory No. 67 of the same set requests particular facts which support Lomar's answers to Interrogatories 63, 64, and 65. Lomar's answer states:

> In the early part of July, 1981, in Davenport, Iowa, in a Gourmet Foods sales meeting, Gourmet Foods salesmen were instructed to stop selling Celestial Seasoning, Inc. products to customers in Iowa.
> On July 8, 1981, Art Stone wrote a letter to Ken Vickerstaff stating he wanted an exclusive distributorship for Celestial Seasoning, Inc. products in Iowa
> Bob Mitchell, store manager for the Dahl's Market at 3710 Hubbell Avenue, sometime in September, 1981, advised Steve Frede, an employee of plaintiff, that a Gourmet Foods, Inc. salesman had offered to sell him Celestial Seasoning, Inc. products on terms described in the answer to Interrogatory No. 63.

In addition, Lomar asserts that its sales of Celestial products had been increasing steadily prior to termination, that Lomar had never been given any sales goals by Celestial, that Lomar had never been advised that its sales performance was unsatisfactory, and that Lomar was terminated after conversations between Ken Vickerstaff, Art Stone and Geoffrey Michael.

Again, these facts do not reach the standard of proof required by *Monsanto Co.* and, thus, defendants are entitled to summary judgment as to plaintiff's section 1 claim relating to the price fixing of Celestial products.

C. Horizontal Territorial Restraints.

Finally, Lomar has asserted that it will prove a conspiracy to engage in horizontal territorial arrangements. Unlike its price-fixing and boycott theories, plaintiff did not devote a section of its Memorandum filed on July 7, 1983 to this theory. Nor is the theory of horizontal territorial arrangements addressed in plaintiff's Memorandum filed March 30, 1984. In light of the respect plaintiff has shown for this theory, it is enough to say that the facts of this case cannot be strained to show horizontal territorial restraints such as those condemned as unlawful per se in *United States v.*

Topco Associates, 405 U.S. 596 (1972).

III. Conclusion

First, plaintiff's Sherman Act claim as to Chicago Dietetic products is time barred. Second, plaintiff's boycott theory as to Dieter's and Celestial products is more properly characterized as a vertical nonprice restriction and thus not subject to the per se rule. Third, with respect to plaintiff's price-fixing theory, plaintiff has failed to produce sufficient evidence to allow for the inference of concerted action to set prices; thus, defendants are entitled to summary judgment of this claim. Accordingly,

IT IS THEREFORE ORDERED that the motion for summary judgment of Defendants Gourmet Foods and Art Stone as to plaintiff's Sherman Act claim relating to Chicago Dietetic products is hereby granted.

IT IS FURTHER ORDERED that the motion for summary judgment of Defendants Gourmet Food and Art Johnson as to plaintiff's Sherman Act claim in respect to Dieter's Gourmet Foods, Inc., products is hereby granted.

IT IS FURTHER ORDERED that the motion for summary judgment of Defendants Gourmet Foods and Art Johnson as to plaintiff's Sherman Act claims in respect to Celestial Seasoning, Inc., products is hereby granted.

June 27, 1985.

Donald E. O'Brien, Judge
UNITED STATES DISTRICT COURT

Appendix C

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 86-1178SI

Lomar Wholesale Grocery, Inc., etc.,	*	
Appellant,	*	
vs.	*	Appeal from the United States District Court for the District of Southern Iowa.
Dieter's Gourmet Foods, Inc., etc., et al,	*	
Appellees.	*	

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

August 13, 1987

Order entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.